# CONSTITUTIONAL RESTRAINTS UPON THE JUDICIARY

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# HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

OVERSIGHT HEARINGS TO DEFINE THE SCOPE OF THE SENATE'S AUTHORITY UNDER ARTICLE III OF THE CONSTITUTION TO REGULATE THE JURISDICTION OF THE FEDERAL COURTS

MAY 20, 21, AND JUNE 22, 1981

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# CONSTITUTIONAL RESTRAINTS UPON THE JUDICIARY

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WEDNESDAY, MAY 20, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Leahy and Grassley.

Staff present: Randall Rader, counsel; Steve Markman, general counsel; Peter Ormsby, professional staff assistant; Claire Greif, clerk; and Kim Beal, assistant clerk.

## OPENING STATEMENT OF PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY (acting chairman). Senator Hatch is on his way over, but knowing that we have a number of witnesses here this morning, I will start the hearing for the chairman.

I am required to go to a debate on the floor where I will be handling a bill, and I will have to leave here early.

I say that with a great deal of regret, because of the witness list that we have this morning—with Mr. Ratner, Mr. Alexander, Mr. Bator, and Mr. Taylor.

I have read the statements of each of these gentlemen. I have read also other materials written, both by Mr. Ratner and especially by Mr. Taylor. I have enjoyed that over the years.

I can think of few hearings more likely to make a lasting contribution to the Congress than the hearings that we will begin this morning.

The witnesses today will not be addressing any one bill, but they will be helping the Senate to define the scope of its authority under article III of the Constitution to regulate the jurisdiction of the Federal courts.

The proceedings before us this morning raise some of the most difficult and profound questions of constitutional law in history.

Two bills before the Senate and two before the House would eliminate the jurisdiction of lower Federal courts to deal with particular issues described in the legislation.

One Senate and eight House bills would curtail the jurisdiction of all Federal courts to hear specified cases.

All of these bills limiting Federal court jurisdiction grow out of these sponsors' discontent with Supreme Court holdings in such diverse and trying issues as school busing and abortion and school prayer.

Consequently, the bills raise questions well beyond the supervision and management of our Federal court system.

There are really two distinct areas for us to examine in these hearings, and both are vital. The first is the extent of Congress authority under article III of the Constitution to control the jurisdiction of both the lower Federal courts and the Supreme Court.

The second area is the question of how and to what extent the Congress ought to exercise its constitutional authority, however broad or narrow it is, to alter the existing jurisdiction of either the lower Federal courts or all Federal courts.

In the first issue of the authority of Congress, we are fortunate to have before us witnesses with great learning and experience in constitutional matters. Congress has always had the authority, and indeed the duty, to interpret the Constitution.

The guidance we will have in the next few days will be of inestimable value in this endeavor. Ultimately, Congress will have to use its best judgment as to the constitutionality of each bill to come before it.

It would be very useful if we could establish some norms and guidelines to aid our analysis.

Once we have determined that we possess the constitutional authority to act, we must answer the question of whether we ought to act. It is on this second issue that I have the greater concern.

Congress must have the authority to check a judicial branch that consistently exceeds its constitutional role. The hearings that begin this morning will go far to inform us of how that corrective medicine might be administered, when and if it is ever needed.

Congress must resist the temptation to adjust the jurisdiction of the lower Federal courts, or of all Federal courts, to respond to particular decisions of the Supreme Court.

The process of constitutional amendment is clearly open to the Nation to alter or reverse a judgment of the Supreme Court. While that process is slow, the result is a more certain measurement of national sentiment and a deeper request for the law that results.

Limiting the jurisdiction of the courts is a means of reversing particular decisions or limiting their effect as a grave and potential threat to our system of checks and balances.

The separation of powers has never been absolute in our system of Government. The three branches overlap. The lines of authority are at times unclear.

Underlying the success of the system over nearly 200 years, is a strong Nation of comity and accommodation among the branches. The self-restraint exercised by each branch is strengthened by genuine concern about destroying that sense of comity, just as one is careful to nurture a fruitful relationship with a good neighbor.

Congress is being exhorted now to define the limits of its power to shape and reshape Federal jurisdiction.

I strongly support the effort to explore these issues, because for too long they have been neglected by the legislative branch.

I hope that in the ensuing months, we do not always conclude that what is permissible is always wise. Even if the present hearings convince us that we may do so, I believe we should proceed cautiously before using the article III powers of Congress to affect particular court decisions.

Both the constitutional amendment procedure and the political process itself have been vigorous agents of change. They appear to be working pretty well today.

Legislating speedier changes through regulation of court jurisdiction might alter, perhaps forever, the nature of the Federal judiciary. For me, this result would make the price of these speedier changes—however desirable—too high.

In conclusion, let me mention one thing.

Customs in governing are sometimes more important than we can rationally explain. Winston Churchill played a strong part in the plans to rebuild Parliament after World War II devastation. Many people suggested using the opportunity to eliminate the building's odd corners and those labyrinth walls that had grown up over the centuries. Churchill refused. We build our buildings, he said, and thereafter our buildings build us.

That thought is well-applied to the most enduring of American Government structures, the Constitution.

Mr. Chairman, I am delighted to have a chance to be here at your hearing. I was explaining to the people here that I have to be on the floor managing one side of a debate in about half an hour, so I started early.

## OPENING STATEMENT OF ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Thank you. I appreciate that, Senator Leahy. I am glad that you did.

I was detained over in the Capitol. I apologize to our witnesses today for not being here on time.

With this hearing today, the Constitution Subcommittee is embarking upon exploration of a much larger issue than might be at first apparent within the language of the article III exceptions clause to which we will address most of our commentary. The subcommittee will actually be addressing in a broader context the constitutional role of the judiciary and Congress function to participate in defining that role.

Article III of the Constitution outlines the form and authority of the judicial branch of Government. Section 2 of that article lists the original jurisdiction of the Supreme Court—the types of cases the highest court will have exclusive and unchallenged authority to decide—and then proceeds:

> In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

On its face, this language appears to grant the legislative branch authority to regulate which cases the Supreme Court can hear on appeal from State courts.

Although much of our inquiry today will necessarily delve into history as we explore the intent of the framers, the implications of this language for preserving the balance of powers in this constitutional Republic lie in the future.

As we examine the past, we will survey apprehensions about the judiciary at the time of the constitutional convention, including the words Alexander Hamilton used to reassure those who feared the reach of judicial power:

> If some partial inconveniences should appear to be connected with the incorporation of any of the powers of the Federal judiciary into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.

This is from the Federalist, No. 81.

At this time, several substantial constituencies are appealing to the Senate to employ the exceptions clause to redress some inconveniences, to use Hamilton's euphemism. These interests contend that the Federal courts have become originators or legislators of controlling norms, rather than interpreters of norms received from Congress.

In commending to Congress the authority to regulate appellate jurisdiction, the Constitution has placed upon this branch the implied obligation to examine the use to which the Federal courts have put the power to hear appeals granted by this legislature.

While the subcommittee does not intend to devote much energy in this hearing to consideration of the various applications of the exceptions power now pending in bills before the Senate, we must nonetheless recognize the wider implications of our inquiry.

Before undertaking any action relative to the exceptions power, the Senate should have the benefit of a comprehensive legal record on the nature of its constitutional obligations. That will entail as well a review of the statements of the Supreme Court itself relative to the exceptions clause.

The case of *Ex Parte McCardle* is without doubt the most important legal precedent. In this case, the Supreme Court dismissed the habeas corpus appeal of a southern editor, challenging the constitutionality of Congress post-Civil War reconstruction program because its appellate jurisdiction had been withdrawn by statute.

At length, the subcommittee must also inquire into the limits on the congressional authority. The Constitution itself contains no express limits on this power to set the parameters of the Federal judicial jurisdiction to hear appeals; or, stated differently, to set the parameters on leaving judicial jurisdiction to the State courts, bound as they are by the Constitution. Yet the Constitution must be read as a unified document with some phrases implying limitations on others.

As I have already stated, these questions will have relevancy far beyond the delight they provide for constitutional scholars.

If this constitutional power was granted to Congress to check the judicial nationalization of important issues or as a tool to carry out the mandate of the 10th amendment with respect to legal disputes, then the Senate must consider the magnitude of its responsibility.

This inquiry will certainly influence the future of relations between the judiciary and the legislative branches. Accordingly, we have invited some of the finest constitutional scholars in the Nation to examine the exceptions clause of the Constitution, both today and in subsequent hearings.

They are of different viewpoints, as we would expect.

As we embark upon this important hearing, I would like to stress, again, that we are not examining at this time the issues urged as specific applications for the exceptions power.

This discussion on congressional power to check the judiciary concerns a constitutional question of importance, not only to those specific issues but to the balance of powers in our Republic.

We are happy to welcome our witnesses here today. Our first witness will be Prof. Leonard G. Ratner.

The subcommittee is very pleased to welcome him as the first witness on this important topic.

Professor Ratner is the Legion Lex Professor of Law at the University of Southern California.

Since 1960, when he published an article giving expression to one of the leading theories on the exceptions clause, he has been acknowledged as the foremost spokesman on this issue.

The subcommittee could have no more capable witness, with respect to his viewpoints, than the noted professor himself.

We welcome you to the committee, and we are happy to have you give us the benefit of your knowledge today.

May I also explain, before you begin, that the subcommittee customarily encourages its witnesses to summarize their written testimony in 10 minutes or less.

The entirety of your written presentation, and of all witnesses today, will be included in the record of our proceedings.

After your brief oral summary, the subcommittee, of course, will inquire about the implications of your presentation.

We are delighted to have you here. If you can live within those parameters, that is fine. If you cannot, let me know.

Please proceed, Professor Ratner.

## STATEMENT OF LEONARD G. RATNER, LEGION LEX PROFESSOR OF LAW, UNIVERSITY OF SOUTHERN CALIFORNIA

Dr. RATNER. I will do my best, Mr. Chairman.

Senator HATCH. It is a complex subject isn't it?

Dr. RATNER. That is asking a lot from a law teacher and a lawyer. Those are both composed of people who are pretty verbose.

You have saved me a good deal of time by your initial introduction.

I would like very briefly to try to delineate the nature of the issue here. I think understanding the nature of this constitutional issue is a good deal of help, in resolving it.

As you have indicated in your initial statement, article III of the Constitution gives the Supreme Court certain jurisdiction. The Supreme Court is the only court created by the Constitution.

### THE CONSTITUTIONAL PROVISION: THE EXCEPTIONS AND REGULATIONS CLAUSE

Article III establishes the Supreme Court, gives it original jurisdiction in two situations, and then provides: In all other cases, the jurisdiction shall be appellate—that is, in all other cases to which the judicial power of the United States extends—with such exceptions and under such regulations, both as to law and to fact, as the Congress shall make.

The lower Federal courts are not created by article III. The lower Federal courts are created by Congress. By virtue of that plenary authority to create the lower Federal courts, congressional control over the jurisdiction of lower Federal courts is more extensive. If Congress can create them, Congress can delineate their jurisdiction. Of course, all congressional power with regard to jurisdiction is subject to the Bill of Rights and to the limitations of due process and equal protection.

With regard to the question of how far the exceptions and regulations clause permits Congress to go in actually controlling the decisions of the Supreme Court, some of the language of older Supreme Court cases has suggested, that the power is essentially a plenary power. But no holding has ever confirmed such power.

## THE AMBIGUITY OF "EXCEPTIONS AND REGULATIONS"

The issue is one of interpretation. Essentially, questions of interpretation cannot be resolved by definition. That is the easy way to approach them. definitions ordinarily do not help very much. Language is necessarily ambiguous, particularly constitutional language, and this particular clause is no exception.

The words "exeptions and regulations," used in the clause, are of course, the key words. Legal dictionaries and treaties in existence at the time the Constitution was adopted indicate that an "exception" cannot destroy the essential characteristics of the broader subject to which it applies and that regulations usually specify a condition for engaging in certain conduct but do not ordinarily prohibit the entire activity that is the subject of the regulation.

The scope of those words is by no means clear. This matter of interpretation cannot be dealt with simply by looking up the words in the dictionary. Essentially, the question is: Can Congress under this clause abolish the Supreme Court's entire appellate jurisdiction or abolish it entirely in certain kinds of cases, in which event there could be no Supreme Court decision as to constitutionality in such cases.

## THE JUDICIAL REVIEW FUNCTION

In order to come to grips with the problem, we have to consider the underlying goals and purposes of article III—the constitutional purposes—and the context in which this particular clause is used.

The Constitution essentially establishes government that is a majoritarian democracy. But majoritarian control, as manifested primarily by the political branches of government, is limited by this same Constitution. There are minority protections, of which the Bill of Rights is the preeminent source.

We have this interesting, and it would appear somewhat contradictory, arrangement wherein the majority is limited in certain respects by the minority. But in fact, there is no contradiction because the minority is not limiting the majority. The majority is limiting itself.

The majority recognizes that for the system to function effectively and for the majority's own benefit, it is important to protect minority rights. Majorities are just political coalitions. Those who are with the majority today may be in the minority tomorrow.

Consequently, self-protection requires minority protection. Minority protection also reduces social disruption.

These minority protections are long-term constitutional goals. Implementation of these goals requires an institution to interpret and apply them. The political majoritarian institutions that are limited by the Constitution ought not have the final say as to the nature and application of the limitations on their own power. The judiciary performs that function, because in Madison's words, it is "the least dangerous branch."

This judicial review power, derived from the Constitution, is subject to various checks and balances. The exceptions and regulations clause is such a check. But how far does the check extend? Can the check stultify the essential constitutional functions of the Court, or is the check designed to supervise and direct the flow of cases to the Court?

## ESSENTIAL CONSTITUTIONAL FUNCTIONS OF THE COURT: MAINTAINING THE UNIFORMITY AND SUPREMACY OF FEDERAL LAW

In order to interpret the exceptions and regulations clause, it is necessary to examine the essential functions of the Supreme Court under the Constitution. The Supreme Court was created by the Constitution to perform certain functions that are essential to the constitutional system itself.

The Supreme Court's essential function is not simply to determine constitutionality and apply Federal law. That function is shared with other courts. It is in the context of a large federal system with many State and lower Federal courts that the Supreme Court performs its essential functions. In that context, a single Supreme Court at the apex is essential to the functioning of the entire system.

This is clearly indicated by the supremacy clause of article VI. That clause states that this Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the Constitution or laws of the several States to the contrary notwithstanding.

That is an emphatic statement indicating there should be one Federal law throughout the land. It means that the Federal Constitution and laws should be the same everywhere, that they should be interpreted in the same way and have the same meaning throughout the country. In other words, uniformity of Federal law is essential.

Uniformity of Federal law can be achieved only if there is one Supreme Court to ultimately resolve conflicting interpretations of Federal law, including the Constitution, by State and lower Federal courts. Otherwise, we have essentially different Federal law in the different circuits and the different States.

In addition, the supremacy clause indicates that in the event of conflict between State law and Federal law, and in particular, of course, between State law and the Federal Constitution, Federal law shall prevail. That is made emphatically clear.

The supremacy of Federal law is essential to our federal system. If each State could decide for itself what its constitutional obligations were under the Constitution, we would not only have differing interpretations by the different States but we would have the States in effect eroding in various ways the constitutional limitations. It would seriously undermine the Constitution.

The supremacy of Federal law can be maintained only if there is review of State court decisions concerning Federal law by a Federal judicial institution, which must be the judicial institution at the apex—the U.S. Supreme Court. That function is essential to the operation of the federal system and, in particular, to the implementation of the supremacy clause.

Thus, as indicated by the supremacy clause, the essential constitutional function of the Supreme Court is to maintain the uniformity and supremacy of Federal law. Article III confirms that role by creating one Supreme Court and giving it appellate jurisdiction over all cases involving the judicial power of the United States.

The supremacy clause and article III were discussed and developed together at the constitutional convention, and the Supreme Court's essential function to maintain the supremacy and uniformity of Federal law was expressly recognized by the framers.

These essential functions were also emphatically recognized by the Supreme Court, itself, in three early landmark cases—*Martin* v. *Hunter's Lessee; Cohens* v. *Virginia;* and *Ableman* v. *Booth.*

Story, Marshall, and Taney all insisted in that the Supreme Court must have authority to review State court decisions and to maintain the supremacy and uniformity of Federal law. That is spelled out at some length in my written statement, which includes quotations. It is interesting to note that Taney—that staunch State's rights advocate—acknowledged that the Supreme Court of the United States must operate to ultimately review constitutional decisions by State courts.

### UNLIMITED EXCEPTIONS AND REGULATIONS POWER VS. THE COURT'S ESSENTIAL FUNCTIONS

It is not consistent with this constitutional plan to interpret the exceptions and regulations clause as giving Congress unlimited authority over the court's appellate jurisdiction. If Congress had such power, Congress could profoundly alter the structure of the Federal system. Congress might deprive the Supreme Court of appellate jurisdiction over any case arising under the Constitution, laws, or treaties of the United States and thereby allow the Federal courts of appeal and the highest State courts to become in their respective jurisdictions the final interpreters of Federal law. This would reduce Federal law and the Constitution to a kind of hodgepodge, as determined by 50 State supreme courts and 11 Federal courts of appeal.

Or Congress could deprive the Supreme Court of appellate jurisdiction and other Federal courts of all jurisdiction over cases involving the constitutionality of State statutes or the conduct of State officials. That would leave to the highest court of each State the final determination as to the constitutionality of State law.

Ultimately, if Congress had this power, it could deprive the Supreme Court of all appellate jurisdiction and abolish the lower Federal courts, and thereby confining the entire judiciary of the United States to a single court exercising just the original jurisdiction stated in the Constitution; namely, over cases affecting ambassadors, public ministers, and counsels, or to which a State is a party.

It is, of course, not likely that Congress would so act. But in fact over the years there have been a number of bills introduced in Congress, starting back in 1840, designed to remove from the appellate jurisdiction of the Supreme Court cases originating in State courts.

From 1953 to 1968, over 60 bills were introduced to eliminate Federal court, including Supreme Court, jurisdiction over particular subjects. For example, the Jenner bill, introduced in 1957, would have removed Supreme Court jurisdiction over five specified areas, concerned principally with subversive regulation, and thereby forestalled the exercise of the Court's essential functions in those areas, leaving the constitutional decision largely to the States and sometimes to the lower Federal courts. In 1979, Senator Helms introduced a rider, still pending, which would bar Supreme Court review of any case that concerned voluntary prayers in the public schools. There have been others. These bills have not been enacted, but they have been introduced, which indicates that this is a significant, current issue.

It is not reasonable to conclude that the Constitutional Convention gave Congress that kind of power—power to destroy the essential role of the Court and to significantly alter the constitutional plan itself. It is more reasonable to interpret the clause as meaning that the Supreme Court has appellate jurisdiction with such exceptions and under such regulations as Congress may make not inconsistent with the essential functions of the Supreme Court under the Constitution.

## THE EXCEPTIONS AND REGULATIONS CLAUSE AS A CONSTITUTIONAL CHECK

That raises the question: Under such an interpretation what is the function of the exceptions and regulations clause. The clause is an important check—I believe, Senator Hatch, you referred to the Federalist Papers and to Hamilton's use of the word "inconveniences," which, like all of these words, is rather vague. By exercising that authority, the Congress can provide orderly procedures for appellate review by the Supreme Court, i.e., remove inconveniences, and it can make adjustments in the jurisdiction of the Court from time to time to meet changing social and political needs.

It can, for example, affect the speed of decision. It can expedite or slow down. That is one of the ways Congress can indicate its feelings about what is going on. Congress on two occasions has slowed down review by the Supreme Court. One was back in 1803 when the new Democratic-Republican Congress passed a bill to eliminate some of the previously established Federal judgeships that the outgoing Federalist Congress had established. The new Congress was afraid the Supreme Court was going to declare that bill, which eliminated some Federal judgeships, unconstitutional. They eliminated one term of the Supreme Court and delayed the decision for a year. They wanted more discussion throughout the country, and they wanted an opportunity to clarify the issue. But ultimately, it came before the Supreme Court, which upheld the new statute.

Congress can limit review of questions of fact. Such questions do not ordinarily involve the essential functions of the Supreme Court. The Court has constitutional authority to review facts, but Congress can limit that authority. Congress could eliminate the diversity jurisdiction, which does not involve essential functions. Congress could put minimum monetary limits, where appropriate, on the Court's review.

Every Federal question case does not have to come to the Supreme Court. As long as a significant avenue remains open for ultimate resolution by the Court of conflicts between State and Federal law or in the interpretation of Federal law, the Court's essential functions are not impaired. Discretionary review by certiorari, which Congress has provided, is an effective method. There can be various jurisdictional limitations, so long as some avenue remains for ultimate performance of the essential functions. But if all avenues are eliminated, then the essential functions are unconstitutionally impaired.

### CONGRESSIONAL AND JUDICIAL REFUSAL TO IMPAIR THE COURT'S ESSENTIAL FUNCTIONS

In closing, let me point out that the Congress of the United States has itself recognized and respected the essential constitutional functions of the Court. None of these bills has been passed. I think the Congress recognizes that its authority does not, extend so far.

The Supreme Court has never held that Congress had that kind of authority. In *Ex Parte McCardle,* Congress eliminated one method of Supreme Court review in habeas-corpus cases, namely, by appeal, while the appeal was pending. The Court acknowledged that it no longer had jurisdiction to hear the appeal, but emphasized that another method of Supreme Court review remained available—the old, long-standing method under the Judiciary Act of 1789 to petition the Supreme Court directly for a writ of habeas corpus after the lower court had refused to issue the writ. The Court said: We no longer have authority under the new method of appeal, but the old method of review is still available to us. Thus, *Ex Parte McCardle* clearly does not hold that Congress can withdraw from the Court all jurisdiction over a particular kind of case and thereby obstruct the Court's essential functions. *Martin, Cohens,* and *Ableman* indicate it cannot.

Thank you very much.

Senator HATCH. Thank you, Professor.

Your testimony does make an excellent point—that if Congress imprudently deprived the Supreme Court of all jurisdiction to hear any appeal, the role of the Federal judiciary would be clearly impaired.

I know of no proposal to stretch that power to that unreasonable degree, however, I do not think we have ever had that proposal here.

The Supreme Court once said, however, in *Klein* v. *U.S.,* that:

> If the Congress simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make such exceptions from the appellate jurisdiction as should seem expedient.

If Congress were not trying to strip the Supreme Court of all appellate jurisdiction, but only intending to uphold federalism by letting State courts decide a limited and narrowly drawn class of cases, would your analysis change?

Dr. Ratner. No. If Congress tried to keep any particular kind of State case from ultimate Supreme Court review as to constitutionality, each State could then decide for itself the constitutionality of its own laws. That, I think, is directly contrary to the nature of the Federal system, and particularly to the supremacy clause which says that the Constitution is the supreme law of the land. It directs the State courts to comply with the supreme law of the land. But without a Federal judicial institution to enforce that injunction you have no more than an exhortation.

As the Constitution gives the courts the authority to declare acts of Congress unconstitutional—because Congress itself really cannot impose the constitutional restraints on itself—so the Constitution gives to the Federal Supreme Court the ultimate authority to determine the constitutionality of State laws, because each State may not determine the constitutional limits on itself.

Senator Hatch. Several constitutional scholars have suggested that the essential functions test rests on "indefinite grounds"—Merry, "scope of Supreme Court's appelate jurisdiction" 47 Minn. L.R. 53, 162 (1962).

By this, I assume they mean that the only body that could define what classes of cases affect the Court's essential functions would be the Supreme Court itself because the Constitution contains no specific definition of the "essential function" test.

Would not this place the Supreme Court in the novel position of determining the extent of its own power to declare the law?

Dr. Ratner. There are two aspects to that.

In the first place, the essential functions test, while having an area of ambiguity, which is inevitable I suppose, is very ambiguous. The function of the Court is to ultimately review or have an avenue for reviewing interpretation of Federal law and constitutionality. That is not a difficult concept. The constitutionality of State law must ultimately be subject to review by one Federal judicial institution, namely the Supreme Court of the United States, and when there is a conflict in the interpretation of Federal law in any of the lower courts—Federal or State—there must be some avenue for ultimate Supreme Court resolution. It does not have to be immediate. You can have a measure of inconsistency for awhile. Every case does not have to get up there. There must be some way of resolving conflicts in interpretation of Federal law so that we have one Federal law. Those are the standards, and I suggest that they are not that vague.

Now with regard to the Supreme Court determining the scope of its own authority, that has been true since *Marbury* v. *Madison*. The Supreme Court in deciding the meaning of the Constitution and the limitations that the Constitution imposes decides the constitutional limits on its own authority.

It is true that the Supreme Court can interpret the constitutional limits on itself, while Congress cannot. That is a particularly significant aspect of the constitutional plan.

I think that Congress is the preeminent lawmaking institution in the United States. I do not really think the three branches of government are quite coordinate, although every political science textbook says they are. I think Congress has preeminent authority. But the power of ultimate constitutional interpretation is conferred upon the courts because the judicial institution is a special kind of institution. It is the least dangerous branch. It does not have the power of the purse or the sword or extensive administrative control that the other branches have. It can only decide cases brought before it. It is subject to a long tradition of restraint—at any rate we hope so. It is subject to many pressures and has responded to those pressures. Congress has various ways of showing its disapproval. Congress can reenact laws with policies similar to invalidated legislation. Vigorous public debate influences the Court. The size of the Court may be varied by Congress. And of course, there is constitutional amendment.

Some institution must have authority to definitively interpret the Constitution, and the courts are given it because they are—to repeat again—the least dangerous branch.

Senator HATCH. Thank you, Professor Ratner.

We appreciate your comments and your testimony here today.

Dr. RATNER. I appreciate being asked. It was a pleasure to come. Thank you very much.

Senator HATCH. Thank you so much.

[The prepared statement of Dr. Ratner follows:]

## PREPARED STATEMENT OF LEONARD G. RATNER

### A. *Congressional Power over the Appellate Jurisdiction of the Supreme Court*

Article III of the Constitution defines the judicial power of the United States, creates the Supreme Court, and identifies the jurisdiction of that Court. The original jurisdiction of the Court (as a court of first instance) is limited to cases affecting ambassadors, public ministers, and consuls or in which a state is a party, and cannot be modified by Congress. The Court, however, is given appellate jurisdiction, both as to law and fact, over all other cases to which the judicial power of the United States extends "*with such exceptions and under such regulations as the Congress shall make*" (emphasis added). The language, though not the holdings, of some earlier Supreme Court cases suggests that the exceptions and regulations clause gives congress unlimited control over the appellate jurisdiction of the Court, but such an interpretation is not consistent with the constitutional plan and modern judicial approval of such an interpretation is doubtful. (See Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. of Pa. L. Rev. 157 (1960); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953); Roberts, *Now is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1944); Levy, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. Intra. L. Rev. 178 (1967); Sedler, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. Pitt. L. Rev. 99 (1958); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 Ore. L. Rev. 3 (1973); Van Alystyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229 (1973); Senator Thomas Kuchel, *Shall the Federal Judiciary Become Subservient to the Congress* (speech, 88th Congr. 2nd Sess.) 110 Congressional Record No. 172, Sept. 9, 1964; Douglas and Black dissenting in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1960): "There is a serious question whether the McCardle case [upholding a narrow limitation on the Supreme Court's appellate jurisdiction] would command a majority today." But cf. Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001 (1965).

Constitutional authority to create and abolish inferior federal courts gives Congress plenary control over their jurisdiction (see B below). If Congress also has plenary control over the appellate jurisdiction of the Supreme Court, then Congress may constitutionally do any of the following:

(1) Deprive the Supreme Court of all appellate jurisdiction and abolish the lower federal courts, thereby confining the judiciary of the United States to a single court exercising original jurisdiction over cases affecting ambassadors, public ministers, and consuls, or in which a state is a party.

(2) Deprive the Supreme Court of appellate jurisdiction and other federal courts of all jurisdiction over cases involving the validity, under the Constitution, of state statutes or the conduct of state officials, thereby leaving to the highest court of each state the final determination of such questions.

(3) Deprive the Supreme Court of appellate jurisdiction over any case arising under the Constitution, laws, or treaties of the United States, thereby allowing the federal courts of appeals and the highest state courts to become, in their respective jurisdictions, the final interpreters of federal law.

If such legislation were permissible, Congress could by statute profoundly alter the structure of American government. It could all but destroy the coordinate judicial branch and thus upset the delicately posed constitutional system of checks and balances. It could distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution. It could reduce the supreme law of the land as defined in article VI to a hodgepodge of inconsistent decisions by making fifty state courts and eleven federal courts of appeals the final judges of the meaning and application of the Constitution, laws, and treaties of the United States.

One of the most significant aspects of the federal union is disclosed by the declaration in article VI of the Constitution that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This constitutional mandate requires (a) that there shall be one supreme federal law throughout the land and (b) that in the event of conflict between that law and the law or authority of any state, the federal law shall prevail.

The supremacy clause standing alone, however, is no more than an exhortation. A tribunal with nationwide authority is needed to interpret and apply the supreme law. Such a tribunal is created by article III, which vests the judicial power of the United States in one Supreme Court and such inferior courts as Congress may establish and extends that power to every case involving the supreme law of the land. The only court created by the article is designated as supreme in contrast to the inferior courts which Congress in its discretion may establish. That court alone is expressly given appellate jurisdiction over cases involving the supreme law of the land whether those cases are initiated in state or federal courts. It is thus the constitutional instrument for implementing the supremacy clause. As such, its essential appellate functions under the Constitution are: (1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law, including the Constitution, when it conflicts with state law or is challenged by state authority.

The process of carrying out these functions is necessarily a flexible one. A Supreme Court decision is not requird in every case that involves a state challenge to federal law or an interpretation of federal law in conflict with other cases. A measure of inconsistency in the interpretation and application of federal law is inevitable, and immediate correction is not always imperative. But some avenue must remain open to permit ultimate resolution by the Supreme Court of persistent conflicts between state and federal law or in the interpretation of federal law by lower courts. For this purpose discretionary review through certiorari can be as effective as mandatory review by writ of error or appeal. Although these essential functions would not ordinarily be disrupteed by a procedural limitation restricting the availability of Supreme Court review in some but not all cases involving a particular subject, legislation denying the Court jurisdiction to review any case involving that subject would effectively obstruct those functions in the proscribed area.

These essential Supreme Court functions were confirmed by the Constitutional Convention, which recognized that the Supreme Court's appellate jurisdiction was required to effectuate the Supremacy Clause. As stated by Rutledge of South Carolina, a strong states-rights advocate: "...the right of appeal to the supreme national tribunal [is] sufficient to secure the national rights and uniformity of judgments." (1 Farrand, Proceedings of the Constitutional Convention 124 (1911). See also The Federalist Papers (Ford ed. 1898) Nos. 22 and 39 (Madison), Nos. 80, 81, and 82 (Hamilton). And, by defeating a motion that would have allowed the Supreme Court to exercise appellate jurisdiction "in such manner as the legislature shall direct" (1 Farrand 425, 431), the Convention rejected plenary Congressional power over that jurisdiction. (See Ratner, supra, 172-73.)

The narrower interpretation of "exceptions and regulations" is supported by dictionaries and treatises in use at the time of the Convention. They indicate that in a legal context an exception cannot destroy the essential characteristics of the broader subject to which it applies and that regulations usually specify conditions for engaging in certain conduct, and sometimes forbid a particular act, but do not ordinarily prohibit the entire activity that is subject to regulation. (See Ratner, supra, 168-171.)

From an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority. These functions were delineated in three notable decisions which confirmed the Court's statutory jurisdiction to review cases originating in state courts.

In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1806), Story, holding that the Supreme Court could constitutionally review state court decisions involving federal questions as provided by section 25 of the Judiciary Act, noted "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." Without a reversing authority to harmonize discordant judgments, he declared, "the laws, the treaties and the constitution of the United States would be different, in different states . . . . The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the Constitution . . . . [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils."

In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), Marshall, upholding the Court's authority to review on writ of error a criminal conviction by a state court involving the interpretation of a federal statute, stated:

> [T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved . . . .
>
> . . . [The framers of the Constitution] declare, that in such cases, the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

And in Ableman v. Booth, 62 U.S. (21 How.) 506 (1858), Taney, holding that state courts had no jurisdiction to issue habeas corpus for persons in federal custody and that the Supreme Court could review by writ of error the issuance of habeas corpus by state courts in such cases, stated:

> But the supremacy thus conferred on this Government [by the supremacy clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place . . . and the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that . . . a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided . . . . And it is manifest that this ultimate appellate power in a tribunal

> created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every State . . . .

The foregoing cases upheld the Court's jurisdiction to review state court decisions under section 25 of the Judiciary Act not only because that jurisdiction was authorized by the Constitution, but also because it was required by the Constitution. The implication of these decisions is that Congress could not constitutionally deny such jurisdiction to the Court.

Many Supreme Court cases have dealt with specific statutory limitations upon the appellate jurisdiction of the Court. While a few contain broad and ambiguous language suggesting that the "exceptions and regulations" clause confers unlimited congressional power over that jurisdiction, none holds that Congress has power to impair the Court's essential functions. In every case the Court either found no limitation on its jurisdiction or upheld a limitation that did not impair those functions. Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869) is the case most frequently said to authoritatively uphold plenary congressional power, but it does not. In 1867 Congress had authorized an appeal to the Supreme Court from circuit court decisions denying habeas corpus. Previously the Court could review such decisions only by issuing an original writ of habeas corpus under the authority granted by section 14 of the Act of 1789. McCardle, a civilian convicted by a military commission of obstructing reconstruction, asserted the unconstitutionality of the Reconstruction Acts and took an appeal to the Supreme Court, as authorized by the Act of 1867, from the denial of habeas corpus by a circuit court. After a government motion to dismiss the appeal was denied, but before decision on the merits, Congress, fearing the Court was about to invalidate the Reconstruction Acts, repealed that portion of the Act of 1867 authorizing such appeals. The Court upheld the validity of the repealing statute and dismissed the appeal, stating that "it is hardly possible to imagine a plainer instance of positive exception. . . . Without jurisdiction the court cannot proceed at all in any case." But the Court carefully pointed out that the repeal did not affect its jurisdiction to issue writs of habeas corpus under section 14 of the earlier Act of 1789:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The [repealing] act of 1868 does not except from that jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

Clearly the language of Ex parte McCardle does not sanction congressional impairment of the essential constitutional functions of the Supreme Court. The statute there upheld did not deprive the Court of jurisdiction to decide McCardle's case; he could still petition the Supreme Court for a writ of habeas corpus to test the constitutionality of his confinement. The legislation did no more than eliminate one procedure for Supreme Court review of decisions denying habeas corpus while leaving another equally efficacious one available.

In contrast with its original jurisdiction, the Supreme Court's appellate jurisdiction under the Constitution is an extensive one, arising not only from the presence of federal questions but also from the status or citizenship of the parties, encompassing issues of both law and fact, and extending to cases which originate in state as well as federal courts. Orderly procedures for invoking that jurisdiction and a method of adjusting it to changing social needs and political attitudes are required. It is reasonable to conclude, therefore, that the Convention gave Congress authority to specify such orderly procedures and to modify the jurisdiction from time to time in response to prevailing social and political requirements, within the limits imposed by the Court's essential constitutional role. It is not reasonable to conclude that the Convention gave Congress the power to destroy that role. Reasonably interpreted the clause means "With such exceptions and under such regulations as Congress may make, not inconsistent with the essential functions of the Supreme Court under this Constitution."

Congressional legislation that restricts the procedures for obtaining Supreme Court review does not transgress constitutional limitations so long as the Court remains available ultimately to resolve conflicting interpretations of federal law and conflicts between state and federal law. But legislation that precludes Supreme Court review in any case that involves a particular subject, such as school prayers or abortion, is an unconstitutional encroachment on the Court's essential functions.

B. Congressional Power Over the Jurisdiction of Lower Federal Courts

Article III confers the judicial power of the United States on "such inferior courts as the Congress may . . . establish." Congressional power to create such courts implies plenary power to specify their jurisdiction. But this congressional power must be exercised in accordance with such constitutional controls as due process and equal protection which limit the exercise of all congressional power.

A congressional statute that withdraws from lower federal courts jurisdiction to enjoin the enforcement of a particular kind of law, such as laws limiting abortion, presents both due process and equal protection problems. Litigants must have effective access to the courts to challenge the constitutionality of state of federal laws. An injunction may be the only effective remedy to prevent enforcement of an unconstitutional law, although a judicial declaration of invalidity may sometimes be sufficient to forestall such enforcement.

If federal courts are precluded from issuing such injunctions, a plaintiff may seek such a remedy in a state court, with ultimate review by the United States Supreme Court, but if the appropriate state court lacks jurisdiction under state law to issue such an injunction, the plaintiff may be cut off from an effective judicial remedy in violation of due process of law. The combined denial of federal and state jurisdiction amounts to a denial of the plaintiff's claim without an opportunity to be heard.

Assuming injunctive relief is available in the state courts, a denial of federal injunctive relief to plaintiffs attacking the constitutionality of laws limiting abortion, but not to plaintiffs attacking the constitutionality of other kinds of laws, may constitute a denial of equal protection of the laws. Such an apparently invidious distinction must be justified by a rational basis, i.e., by a socially-useful purpose. If the purpose is to inhibit federal judicial consideration of the constitutionality of laws that limit abortion, that purpose is a constitutionally-impermissible encroachment on the constitutional power of the courts to determine constitutionality and cannot provide a rational basis for the invidious distinction.

May 28, 1981

Senator Orrin Hatch
Chairman, Senate Subcommittee on
the Constitution
108 Russell
Senate Office Building
Washington, D.C. 20510

Re: Hearings before the Senate Subcommittee on the Constitution: Congressional power over the Supreme Court's appellate jurisdiction.

Dear Senator Hatch:

Because I was the first to testify before the Subcommittee on May 20, I did not have the opportunity to reply to those who followed me on that date. I was not present on the following day, but have been furnished with the statement of Willian Van Alstyne. I am therefore taking the liberty of submitting this supplemental statement in response to some of the comments that relate to my position.

(1) The ambiguity of "essential functions." The essential functions test has been criticized as too ambiguous. That criticism seems to be directed primarily at the words "essential functions"; it does not consider the specific delineation of those functions in my statement to the subcommittee and in my article in 109 U. of Pa. Law Review 157. Of course the words "essential functions" taken alone are ambiguous. But the specification of those functions, namely, to maintain the uniformity and supremacy of the Constitution, laws, and treaties of the United States, provides a workable standard for identifying the functions and their impairment. As indicated in my initial statement and in my article, as long as a significant avenue remains open for ultimate resolution by the Supreme Court of conflicts between state and federal laws or in the interpretation of federal law (including the Constitution), the Court's essential functions are not impaired. (A Supreme Court decision is not required in every case that in-

volves such issues, and discretionary review through certiorari is as effective as mandatory review.)

(2) Plain meaning and the spirit of the Constitution. It was suggested that the plain meaning of the exceptions and regulations clause allows impairment by Congress of the essential function of the Court to maintain the uniformity, if not the supremacy, of federal law, but that the actual exercise of such congressional power would violate the "spirit of the Constitution." The "spirit of the Constitution," i.e., the plan and the goals of the Constitution, however, is the essence of the Constitution. Language, and particularly constitutional language, is inherently ambiguous. The exceptions and regulations clause has no plain meaning. It must be interpreted in the context of the overriding constitutional plan, i.e., in the context of the spirit of the Constitution. Thus interpreted it does not confer upon Congress unlimited control over the Court's appellate jurisdiction. "The letter killeth but the spirit giveth life."

(3) The absence of reference to the federal courts in the Supremacy Clause (Article VI). The Clause, which mandates the uniformity of federal law and its supremacy over state law, manifestly requires judicial enforcement and contains an express admonition to the state judges. The federal courts are expressly given power to enforce the Clause by Article III which extends the judicial power of the United States to cases arising under the Constitution, laws, and treaties of the United States and creates a single supreme federal tribunal with appellate jurisdiction over all such cases, whether initiated in federal or state courts, (subject to congressional exceptions and regulations).

(4) For about a century federal criminal cases (tried in two-judge circuit courts) could not be appealed to the Supreme Court. During this period, however, avenues for Supreme Court review remained available in federal criminal cases to resolve conflicting interpretations of the federal constitution and laws: (a) where the circuit judges were divided, they were required to certify the

disputed question to the Supreme Court (see Hart and Wechsler's, The Federal Court and the Federal System (2nd ed.) 37); (b) a habeas corpus petition could be filed in the Supreme Court to test (i) constitutionality after conviction, (ii) probable cause for pre-trial commitment, which encompassed statutory, as well as constitutional, interpretation. (See Ratner, 109 U. of Pa. Law Review 196-201, and cases there cited.)

(5) Marshall's position. It has been urged that John Marshall, in early decisions, acknowledged unlimited congressional control over the Court's appellate jurisdiction. A careful reading of Ex parte Bollman (8 U.S. 75), U.S. v. More (7 U.S. 159), and Durousseau v. U.S. (10 U.S. 307), however, indicates that Marshall's views were as follows: (a) Congress has broad discretion in legislating exceptions to the Court's jurisdiction; (b) if Congress does not exercise that discretion the Court retains its full constitutional jurisdiction; (c) if Congress exercises the discretion by specifying cases to which the jurisdiction extends, those cases not designated are impliedly excepted. Marshall did not state that the discretion is unlimited nor undertake to determine its constitutional limits. But 11 years later, in Cohens v. Virginia (19 U.S. 264) he declared:

> [T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved . . . . [The framers of the Constitution] declare, that in such cases, the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

(6) Support for the essential-functions test. It is asserted that the essential-functions limitation has no support in the cases, in the Federalist Papers, nor in any statement at the Constitutional Convention. In fact, the essential functions limitation is supported by cases, the Federalist Papers, and statements at the Convention.

(a) Cases. Marshall in Cohens v. Virginia, Story in Martin v. Hunters Lessee, and Taney in Ableman v. Booth all emphasize the essential function of the Supreme Court to maintain the uniformity and supremacy of federal law pursuant to the Supremacy Clause. They uphold the Court's jurisdiction to review, under section 25 of the first judiciary act, state court decisions involving the federal Constitution and laws not only because that jurisdiction is authorized by the Constitution but also because it is required by the Constitution. (See quotes in my prior statement pp. 6-8 and in 109 U. of Pa. L. Rev. at 166-167.) In Ex parte McCardle the Court, after acknowledging that congress had withdrawn its jurisdiction to hear an appeal from a circuit court decision denying habeas corpus to the defendant, recognized the need to preserve its essential appellate functions by emphasizing that it still retained jurisdiction under the Judiciary Act of 1789 to review on a direct petition for habeas corpus the constitutionality of the circuit court's decision. (See prior statement p. 9 and 109 U. of Pa. L. Rev. 178-180.) A few months later in Ex parte Yerger (75 U.S. 85) the Court affirmed its jurisdiction to review on direct petition for habeas corpus the constitutionality of a circuit court decision denying the writ, despite the congressional withdrawal of habeas corpus appeal, and strongly intimated that Congress lacked the power to impair its essential appellate functions by depriving it of all habeas corpus jurisdiction, stating (75 U.S. at 96-103):

> We agree that [the jurisdiction] . . . is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must . . . seriously hinder the establishment of that uniformity . . . which can only be attained through appellate jurisdiction. . . . These considerations forbid any construction giving to doubtful words [in the statute] the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less congent than they are.

There is broad language in some of the cases referring to unlimited congressional control over the Court's appellate jurisdiction, (see Wiscart v. D'Auchy (3 U.S. 321), Barry v. Mercein (46 U.S. 103), The Francis Wright (105 U.S. 381)), but the statements are generalized dicta. No case holds that Congress has the power to impair the Court's essential uniformity-supremacy functions because no case involved such an impairment except Ex parte Yerger which strongly rejected it.

(b) The Constitutional Convention. Numerous statements at the Convention recognized the Supreme Court's appellate jurisdiction as constitutionally essential to maintain the uniformity and supremacy of federal law. In discussing proposals to give the Supreme Court a veto over congressional and/or state legislation, proponents and opponents alike agreed that the Court would at least have ultimate authority to decide the constitutionality of state and federal legislation. In successfully opposing the constitutional establishment of inferior federal courts, Rutledge of South Carolina, a strong states-rights advocate, urged that "the state tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments." Madison, replying to the question of what redresses would be available if a state imposed prohibited export duties stated: "There will be the same security as in other cases--the jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States." And by defeating a motion that would have allowed the Supreme Court to exercise appellate jurisdiction "in such manner as the legislature shall direct," the Convention rejected a clear statement of plenary congressional power over that jurisdiction. (See Farrand, Records of the Constitutional Convention 79, 97, 109, 124; 2 Farrand, 76, 78, 425, 431, 589; 109 U. of Pa. L. Rev. 161-165, 172-173.)

(c) The Federalist Papers. The writings of Madison and

Hamilton in *The Federalist* provide further confirmation of the essential functions of the Court.

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|---|---|
| Madison: (No. 22) | "If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts . . . . To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice." |
| Madison: (No. 39) | "It is true that in controversies relating to the boundary between the two jurisdictions [nation and state], the tribunal which is ultimately to decide is to be established under the general government . . . . Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact." |
| Hamilton: (No. 80) | "If there are such things as political axioms, the propriety of the judicial power of the government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." |
| Hamilton: (No. 81) | "That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested." |
| Hamilton: (No. 82) | "[T]he national and state systems are to be regarded as *one whole*. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union and an appeal from them will as naturally lie to that tribunal [the Supreme Court of the United States] which is destined to unite and assimilate the principles of national justice and the rules of national decision." |

Sincerely,

Leonard G. Ratner

Leonard G. Ratner
Legion Lex Professor of Law

LGR:lrn

Senator HATCH. Our next witness will be Dean George J. Alexander, president of the Society of American Law Teachers.

While representing the society today and not his school, the subcommittee is also proud to note that Dean Alexander is the dean of the Santa Clara University School of Law. He has also served for many years as the chairman of a distinguished committee of the American Bar Association.

His lengthy career of legal scholarship has featured many notable writings in the field of civil rights, in addition to his subject matter for today.

We are pleased to hear from you, Dean Alexander.

Your entire prepared statement will be placed in the record at the completion of your oral testimony.

## STATEMENT OF GEORGE J. ALEXANDER, PRESIDENT OF SOCIETY OF AMERICAN LAW TEACHERS

Dr. ALEXANDER. Thank you very much, Senator Hatch.

It is a great pleasure to be here.

I must admit that I came prepared to discuss something slightly different from what you have announced is under discussion, but I think I can adapt my comments to the topic you have announced.

Article III, section 1, grants Congress broad discretion to establish inferior Federal courts and to define the scope of their jurisdiction. Even if Congress need not grant Federal courts any jurisdiction to hear constitutional claims, and this goes as well for limiting the authority on appeal of the Supreme Court of the United States, Congress may not restrict Federal jurisdiction for the purpose of impeding the enforcement of judicial interpretations of the Constitution.

Every constitutional grant of power to Congress is limited to the purposes for which it is made. This self-evident principle was made explicit by Chief Justice Marshall in *McCulloch* v. *Maryland.*

After establishing the breadth of Congress power, Marshall cautioned:

> Should Congress, under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the Government, it would become the painful duty of this Tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Although the Supreme Court has struck down various laws on the ground of pretext, it has hesitated to strike down others. Its hesitation has not, however, reflected doubts about Marshall's underlying premise that congressional powers may only be exercised for the purposes for which they were delegated.

Rather, it is based on the difficulties and improprieties attending judicial inquiry into legislative motivation necessary to determine whether the exercise of power was a pretext.

This was the basis of *Ex Parte McCardle,* which has been discussed quite a bit already this morning, in which the Court acquiesced in Congress restriction of the Court's appellate jurisdiction in certain habeas corpus actions.

Chief Justice Chase wrote:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words.

However appropriate judicial reluctance to inquire into Congress motives may be, and it is far from clear what the present law on that subject is, it provides no warrant for Congress refusing to inquire into its own motives in enacting a law.

Indeed, the very fact that the judiciary is inhibited from inquiring into whether a jurisdictional statute is a pretext for pursuing objectives not entrusted to Congress imposed a special burden on Congress to monitor the constitutionality of its own action.

The purpose of section 1 of article III is to grant Congress the power to determine the need for inferior Federal courts and the general scope of their jurisdiction.

Neither the language of article III nor anything in the history surrounding its adoption suggests that it was designed to give Congress the power to impede the enforcement of judicial interpretations of the Constitution.

The belief that the Supreme Court has ultimate authority to interpret the Constitution, however deeply ingrained in our history and tradition, is of course not incontrovertible.

However, even were Congress to determine that in some, or all, circumstances it has the ultimate authority to interpret the Constitution, we believe that to use a regulation of jurisdiction as a pretext for asserting its substantive disagreement with the Court's constitutional interpretation would be an abuse of the power delegated by article III.

Thank you.

Senator HATCH. Thank you.

The primary point of your testimony—your brief testimony here today—is that the Congress cannot, or should not, use the exceptions clause to assert its substantive disagreements with the Court's constitutional interpretations.

Dr. ALEXANDER. Yes sir; that is right.

Senator HATCH. The use of the exceptions clause does not overturn court interpretations. In fact, the exceptions clause is criticized by many who disagree with court rulings, because it leaves them in their place as binding precedents through the application of stare decisis to the State courts.

Does it strike you that Congress might use the exceptions power merely to give State courts the discretion to apply those Supreme Court interpretations?

Dr. ALEXANDER. Yes, sir. The exceptions power could certainly be used in that manner if the intention of Congress were not to overturn a judicial interpretation of the Constitution by the Supreme Court of the United States.

That would depend, issue by issue, on the subject matter under consideration.

For example, in a proposal to deprive lower courts of jurisdiction in abortion cases, if it were believed, as it is generally believed, that the intention of such legislation would be to overturn Supreme Court determinations under the right of privacy, that type of legislation would, presumably, be offensive to the Constitution.

Senator HATCH. You seem to intimate that Congress would, by using this power, make it more difficult for individuals to secure their constitutional rights as declared by the Supreme Court.

In some States, however, the State courts might make it more easy rather than more difficult to actually secure those rights. Is not that conceivable?

Dr. **ALEXANDER**. That is certainly possible.

If that were the intention of the drafters of the bill, to facilitate justice under interpretations left to the Supreme Court, then the objection that I came to make this morning would not apply.

Senator **HATCH**. We will leave the record open for any questions that could be posed to you in writing.

We appreciate your making the effort to be with us on what really is a difficult subject and one that is causing quite a furor around the Congress these days.

Thank you so much for your wisdom.

Dr. **ALEXANDER**. Thank you, Senator.

[The prepared statement of Dr. Alexander follows:]

## Prepared Statement of George J. Alexander

Section 2 of the bill deprives lower federal courts of jurisdiction over actions challenging the constitutionality of state anti-abortion legislation. It is evident on the face of section 2, and from the context of the entire bill, that the provision is designed to curtail the enforcement of federal judicial decisions applying the Fourteenth Amendment to state anti-abortion legislation. Under these circumstances, we believe that section 2 is not a legitimate exercise of Congress' Article III authority to regulate the jurisdiction of federal courts.

Article III, section 1 grants Congress broad discretion to establish inferior federal courts and to define the scope of their jurisdiction. But even if Congress need not grant federal courts any jurisdiction to hear constitutional claims, *Congress may not restrict federal jurisdiction for the purpose of impeding the enforcement of judicial interpretations of the Constitution.*

Every constitutional grant of power to the Congress is limited to the purposes for which it was made. This self-evident principle was made explicit by Chief Justice Marshall in *McCulloch v. Maryland*. After establishing the breadth of the Congress' powers, Marshall cautioned:

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Although the Supreme Court has struck down various laws on the ground of "pretext," it has hesitated to strike down others. Its hesitation has not, however, reflected doubts about Marshall's underlying premise -- that congressional powers may only be exercised for the purposes for which they were delegated. Rather, it is based on the difficulties and improprieties attending judicial inquiry into legislative motivation necessary to determine whether the exercise of power was a "pretext." This was the basis of Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869), in which the Court acquiesced in Congress' restriction of the Court's appellate jurisdiction in certain habeas corpus actions. Chief Justice Chase wrote: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

However appropriate judicial reluctance to inquire into Congress' motives may be, it provides no warrant for Congress refusing to inquire into its own motives in enacting a law. Indeed, the very fact that the judiciary is inhibited from inquiring whether a jurisdictional statute is a pretext for pursuing objectives not entrusted to Congress, imposes a special burden on Congress to monitor the constitutionality of its own action. See Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585 (1975). The purpose of section 1 of Article III is to grant Congress the power to determine the need for inferior federal courts and the general scope of their jurisdiction. Neither the language of Article III, nor anything in the history surrounding its adoption, suggests that it was designed to give Congress the power to impede the enforcement of judicial interpretations of the Constitution.

The belief that the Supreme Court has ultimate authority to interpret the Constitution, however deeply ingrained in our history and tradition, is of course not incontrovertible. But even were Congress to determine that in some or all circumstances it has the ultimate authority to interpret the Constitution, we believe that to use a regulation of jurisdiction as a pretext for asserting its substantive disagreement with the Court's constitutional interpretations would be an abuse of the power delegated by Article III.

Senator HATCH. Our next witness will be Prof. Paul Bator of Harvard University. We are pleased to hear from you, Professor Bator. We are particularly delighted to receive your testimony, because you have very recently been actively addressing yourself to the fundamental questions posed by this inquiry.

For instance, just this last January, you delivered a masterful address to the Symposium on State Courts and Federalism in the 1980's, entitled "The State Courts and Federal Constitutional Litigation."

We welcome you and are very interested in your message here today.

## STATEMENT OF PAUL M. BATOR, PROFESSOR OF LAW, HARVARD UNIVERSITY

Dr. BATOR. Mr. Chairman and members of the committee, my name is Paul Bator. I am a professor at Harvard Law School. I teach and write in the field of Federal jurisdiction.

I have a written statement that I will not read.

Senator HATCH. It will be placed in the record at the conclusion of your oral testimony.

Dr. BATOR. I will not read all of it. To save time I will summarize it.

The statement is divided into two parts. The first deals with the power of Congress to regulate the jurisdiction of the inferior Federal courts. The second deals with the power of Congress to make exceptions to the jurisdiction of the Supreme Court.

### I. THE POWER OF CONGRESS OVER THE INFERIOR FEDERAL COURTS

Dealing first with the inferior Federal courts:

The Constitution has many things in it which are not at all clear, but it contains a few that are clear.

One of the clearest is the power of Congress to regulate the jurisdiction of the lower Federal courts.

Article III of the Constitution provides that the "judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

We know that this text was the product of a compromise. The purpose of the compromise was to leave it to legislative judgment, to be made from time to time, whether and to what extent lower Federal courts are needed to assure the effectiveness and supremacy of Federal law.

The constitutional text itself makes clear that Congress is free to decide that there should be no lower Federal courts at all. But the purpose of the compromise embedded in article III goes further than giving the Congress the all-or-nothing power to decide whether lower Federal courts should exist. It leaves to Congress to decide, having created lower Federal courts, what their jurisdiction should be—that is, to decide which of the cases to which the Federal judicial power extends should be litigated in the lower Federal courts rather than the State courts.

The position that Congress has this additional power to pick and choose, to create lower Federal courts and give them less than the entire Federal judicial power, is the only one consistent with the understanding which animated the compromise adopted by the framers. The essence of that compromise was an agreement that the question of access to the lower Federal courts as a way of assuring the effectiveness of Federal law should not be made a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment to be made from time to time in light of particular circumstances.

## II. THE AUTHORITIES

The contrary position, that the Constitution obligates Congress to create lower Federal courts or to vest them with some or all of the jurisdiction authorized by article III has been repudiated by an unbroken line of authoritative judicial and legislative precedents.

From the very first, Congress has acted on the premise that it is for it to decide which, if any, of the cases and controversies enumerated in the Constitution should in the first instance be litigated in a lower Federal court. The very first Judiciary Act, passed by a Congress whose membership included many of the framers of the Constitution, gave the lower Federal courts only a small portion of the Federal judicial power. Cases arising under Federal law could not generally be brought in the lower Federal courts until 1875.

Nor has this exercise of Congress power to control been a one-way ratchet. Congress has consistently felt free to restrict lower court jurisdiction, even after it has been granted. On numerous occasions, it has raised the jurisdictional amount. Most significantly, it has in special cases excluded from the jurisdiction of the lower Federal courts special categories of litigation, including constitutional litigation.

The most significant statutes of this sort are the Norris-LaGuardia Act, the Johnson Act of 1934, and the Tax Injunction Act of 1937.

The Supreme Court has consistently upheld Congress excercise of the power to control the jurisdiction of the lower courts. Indeed, the dramatic fact is that there is not a single Supreme Court case which casts the slightest doubt whatever on the validity of the hundreds of statutes which have been premised on the notion that it is for Congress to decide which of the cases involving the Federal judicial power should be litigated in the first instance in the lower Federal courts.

The most recent statement of the Court on this subject is in *Palmore* v. *United States,* and my statement quotes the relevant language of the Court.

You will have noticed that I am not arguing that Congress has plenary power to determine what, if any, rights shall be enforceable in court. I believe the Constitution does guarantee, under certain circumstances, access to a court. But the Constitution is indifferent whether that access is in the first instance to a lower Federal or a State court. If the Congress decides that a certain category of cases arising under Federal law should be litigated first in a State court, subject to Supreme Court review, neither the letter nor the spirit of the Constitution has been violated. What has happened is that Congress has taken up one of the precise options which the framers of the Constitution envisaged.

### III. LIMITATION ON THE POWER OF CONGRESS

It is commonplace that the power of Congress to regulate jurisdiction cannot be exercised in a manner which violates some other constitutional rule. In that sense, it can be said that the power of Congress is not plenary. Thus if Congress should provide that only Catholics may bring suits in the lower Federal courts, this would be invalid—not because non-Catholics have a constitutional right of access to lower Federal courts but because the Constitution prohibits any congressional action which discriminates among religious denominations.

Similarly, a statute which said that whites only may resort to the district courts would be invalid. The reason, again, is that in the absence of some compelling justification, Congress is not free to draw legislation on racial lines.

Furthermore, I would argue that a congressional statute which regulates the lower courts' jurisdiction in a wholly arbitrary manner, would violate the due process clause.

But it is a fundamental mistake to broaden this argument into an assertion that Congress is not free to pick and choose among different subject matters and to specify categories of cases arising under Federal law which may or may not be brought in the lower Federal courts. Unlike legislation which makes distinctions on the basis of race or religion, there is no independent constitutional rule which says, absolutely or presumptively, that various categories of constitutional litigation must be treated alike. There is no independent constitutional value which says that it is presumptively illegitimate or undesirable to decide that some cases should go first to the State courts, whereas others should go first to the lower Federal courts.

Indeed, it was the very purpose of article III to give the Congress power to make such distinction.

I, therefore, have no doubt whatever that a statute which provided that cases challenging the validity of State legislative apportionments, or cases challenging the validity of statutes regulating abortions, may not be brought in the lower Federal courts but must be brought in the State courts—subject to Supreme Court review—that such legislation would, if technically correctly drafted, be invulnerable to constitutional challenge. There are difficult technical problems in drafting such legislation.

### IV. CONTRARY ARGUMENTS

The contrary arguments I have heard do not seem to me to be impressive. The argument advanced by Justice Story in *Martin* v. *Hunter's Lessee,* that the Constitution requires Congress to vest the entire judicial power in Federal courts, has been rejected in an unbroken line of congressional and Supreme Court precedents.

It is sometimes asserted that Congress does not have the authority to carve out special categories of cases arising under Federal law and remit those to the original jurisdiction of the State courts. It is wholly unclear why this is asserted to be so.

If it is said that this discriminates against a certain category of Federal right, the answer is that such discriminations—that is, the power to pick and choose among different categories of Federal litigation—is precisely the power that article III sought to grant.

A somewhat narrower argument, which you have just heard, is that if it is shown that Congress motive in requiring a certain category of case to be brought in the exclusive original jurisdiction of the State courts is hostility to the substantive constitutional right, it is invalid.

I do not understand how such a rule could be administered. What would be an adequate indication of hostility?

The New Deal Congress, in 1934 and 1937, moved by serious reservations about constitutional doctrines which restricted the States taxing and regulatory authority under the due process clause, provided that constitutional suits to restrain the enforcement of State tax statutes and public utility rate statutes must be brought initially in the State courts in most cases. Are these statutes invalid? No court or commentator—certainly no liberal court or commentator—has so suggested in the past 40 years.

I do not see why a statute providing that suits to restrain the enforcement of a State statute regulating reapportionment or abortions can be thought to be different.

The fact is that the notion that it is illegitimate for Congress to express concerns about constitutional matters through the technique of jurisdictional regulation is itself erroneous. That is just what Congress did in the Johnson Act of 1934 and the Tax Injunction Act of 1937. It is just what it did in the Norris-LaGuardia Act.

Such jurisdictional statutes rest on a rational and legitimate basis. Our federalism benefits if certain types of constitutional issues are subjected to the insights of a State rather than a lower Federal court before they reach the Supreme Court of the United States. The State courts, equally with the Federal, are charged with the task of enforcing and protecting Federal constitutional rights. That is what the supremacy clause is all about. To give them the task of doing so, subject to Supreme Court review, may manifest concern about existing constitutional doctrine but does not subvert it.

Such a decision may rest legitimately on two notions. First, that in interpreting constitutional provisions which restrict State power, it may be wise to have access to the insights of local tribunals which are closest to the problem at hand. Second, it may be politically healthy in the first instance to give the State courts the first opportunity to decide whether the Constitution restricts State power.

I, therefore, conclude that a correctly drafted statute, which does nothing more than reroute original jurisdiction from Federal to State courts in given categories of Federal constitutional litigation, is valid. That does not mean that I am endorsing any such statute as a matter of policy or wisdom. That is a completely different question.

## V. THE POWER OF CONGRESS OVER THE SUPREME COURT; APPELLATE JURISDICTION

Very briefly, I want to discuss the question of the power of Congress over the appellate jurisdiction of the Supreme Court. This issue seems to me to be not so clear. This is a constitutional question which is genuinely difficult.

The difficulty is created by the fact that the exceptions clause seems to say, if it means what it says, that Congress may carve out special subjects from the Supreme Court's appellate jurisdiction and make the State courts the ultimate authority on such issues of constitutional law.

That is troubling, because such a jurisdictional withdrawal would create a system which would be inconsistent with the premises that the framers thought would exist.

The framers did, I think, assume that there would be a Federal court with the authority to make uniform and authoritative pronouncements of Federal law. Even assuming the State courts are wholly conscientious in dealing with Federal law, the problem of the unification of Federal law—of divergent opinions among the State courts—seems to me to be a difficult one.

I said before—that a statute withdrawing jurisdiction from the lower Federal courts would not violate even the spirit of the Constitution. But I think it can be said that a statute withdrawing the Supreme Court's appellate jurisdiction in an important category of constitutional litigation, would in an important sense violate the spirit of the Constitution, even if it didn't violate the letter.

This may be very much like the court-packing power. Congress has undoubted power and valid power to create a Supreme Court with 15 or 50 justices. Such a statute could not be held invalid. Yet there is a sense in which such a statute would be illegitimate, because it would violate the spirit of the instrument which does envisage an independent Supreme Court.

On the ultimate question of validity, I am much more doubtful than Professor Ratner. You have heard the arguments he made about the exceptions clause, which state that there are important limits on Congress power granted in the exceptions clause.

It seems to me there are major weaknesses and flaws in those arguments. The historical evidence is dubious. Arguments which depend, as Senator Hatch said, on the fundamental structural spirit of the instrument are terribly vague. The arguments which flow from the fundamental plan do not in any powerful way tell us what exceptions are valid and what exceptions are invalid.

In this connection, we must remember that Congress has for 150 years made very important exceptions to the appellate jurisdiction of the Supreme Court. For 100 years Federal criminal cases were not reviewable in the Supreme Court. That, of course, greatly prejudices the argument that the power to render uniform judgments is an essential fundamental of the constitutional plan. Cases in the State courts dealing with Federal questions were only partially reviewable until 1911.

My own opinion is the uncomfortable one that the arguments which would place serious limits on the power of Congress to make exceptions are not persuasive.

Nevertheless, it is clear that this is a difficult and ambiguous question. Congress may have the power to make the State courts the courts of last resort in constitutional litigation, but I do think that there are serious questions of legitimacy about the exercise of that power. There are also important policy questions.

I do not understand how it would be tolerable to have a system in which 50 State courts have the ultimate authority to render different decisions on issues of constitutional law.

I am also very troubled by the point that Senator Hatch made. Such a system would freeze the existing Supreme Court's precedents into place. They would continue to have stare decisis authority in the State courts. Those precedents, ironically, might be the very precedents which led to congressional dissatisfaction with the way in which the Supreme Court has acted. That is, you would be insulating those precedents from change, because the State courts could not overrule them.

I conclude, therefore, that resort to the exceptions clause is a dubious expedient. The validity of such a measure would be surrounded by serious doubts. It would be criticized as flying in the face of the spirit of the Constitution. And it would create a host of serious problems in the fair administration of justice.

Thank you, Mr. Chairman.

Senator HATCH. Thank you.

I note in support of your criticism of Professor Ratner's statement, that Chief Justices Marshall, Ellsworth, Taney, Swayne, Waite, and Chase, as well as other modern justices—Douglas, Rutledge, Frankfurter, and others—have made unequivocal statements favoring the power of Congress to withdraw the appellate jurisdiction of all Federal courts.

Moreover, Prof. C. A. Wright's casebook on constitutional law says that this doctrine of essential functions "has little or no direct authority." I would just bring that up for whatever it is worth.

I was very intrigued to read a paper you recently delivered at the Symposium on State courts and Federalism in the 1980's, which was held at Williamsburg, Va., earlier this year.

If I may take the liberty of quoting you, you stated that:

> The importance of creating and maintaining conditions that assure that in the long run the State courts will be respected and equal partners with the lower Federal courts in the enterprise of formulating and enforcing Federal constitutional principles has an additional weighty aspect.
>
> We must never forget that under our constitutional structure, it is the State and not the lower Federal courts that constitute our ultimate guarantee that a usurping legislature and Executive cannot strip us of our constitutional rights.

Would you explain how under our constitutional structure State courts are the ultimate guarantors of constitutional rights? Would you also comment on the ability of the State courts to undertake this duty?

Dr. BATOR. I think the State courts are the ultimate guarantors, because I do believe that Congress can validly restrict access to the lower Federal courts. It cannot control the jurisdiction of the State courts in such a way as to deny substantive constitutional rights.

Since litigation has to start somewhere, there has to be an original jurisdiction. Since most cases may not start in the Supreme Court of the United States, it seems to me a fundamental feature of the system that the State courts' doors must remain open as an ultimate guarantor; and this does give them a very fundamental position in the constitutional plan.

That does not, however, completely remove my troubled doubt about whether the State courts can be given the last word. The problem of uniformity seems to me to be a terribly important problem.

Senator HATCH. In that regard, you have the same concerns as Professor Ratner.

Dr. BATOR. Yes.

I guess in the end, if I had to, I would come down on the opposite side. That is, I would say that if Congress wishes to stretch the Constitution to its limit, it would have the authority to do this.

I think that doing so would be very much the same kind of thing as packing the Supreme Court. It would somehow be contrary to the purpose and spirit of the instrument.

Senator HATCH. All of you first three witnesses have been very interesting to me. Certainly we respect your viewpoints.

I think the subcommittee would profit, however, from hearing your reading of the supremacy clause.

Does the supremacy clause, in effect, say that the Federal courts shall be supreme? How does it affect the State courts in these questions?

Dr. BATOR. I do not think the supremacy clause says anything at all about Federal courts being supreme. It says the Constitution and the law passed under the Constitution—Federal law passed pursuant to the Constitution—shall be supreme.

There is nothing in the supremacy clause which in any way contemplates any special role, at least for the lower Federal courts.

The problem created by the supremacy clause is this question. If there is not a Supreme Court with appellate authority, how will the supremacy that the supremacy clause demands be enforced? That seems to me to be the troubling problem.

Senator HATCH. In your opinion, could a congressional use of the exceptions power be read as an attempt to enforce the 10th amendment as a tool to effect a new wave of federalism?

Dr. BATOR. I can understand how it could be seen as animated by a spirit which is similar to the spirit of the 10th amendment, but it seems to me it would create terrible difficulties in the fair administration of the laws.

Senator HATCH. Likewise, we would like to keep the record open to submit some questions to you and for any colleagues on this committee to do the same.

Dr. BATOR. Thank you very much.

Senator HATCH. Thank you for the efforts you have put forth. We appreciate your testimony.

[The prepared statement of Dr. Bator follows:]

# PREPARED STATEMENT OF PROF. PAUL M. BATOR

Mr. Chairman and Members of the Committee:

My name is Paul M. Bator. I am Professor of Law at the Harvard Law School. I teach courses in Federal Courts and Federal Jurisdiction. I am co-author of a leading text in the field of Federal Courts, Hart & Wechsler's The Federal Courts and the Federal System, Second Edition, and of other writings in that field.

I have been asked to testify about Congress' power to regulate and control the jurisdiction of the federal courts. I will divide my statement into two parts: the first deals with the jurisdiction of the inferior federal courts; the second with the jurisdiction of the United States Supreme Court.

## I

## Congress' Power Over the Jurisdiction of the Inferior Federal Courts

### A.

The Constitution contains many things which are not at all clear. It does contain a few that are clear. One of the clearest is the power of Congress to regulate the jurisdiction of federal "Tribunals inferior to the Supreme Court."

Article III of the Constitution provides that the "judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This text, we know from the records of the Constitutional Convention, was the product of a compromise between those who thought that the Constitution itself should establish a full set of federal courts, and those who thought that the Constitution should authorize no federal courts inferior to the Supreme Court whatever. The purpose of the compromise was to leave it to legislative judgment, to be made from time to time, whether and to what extent lower federal courts are needed to assure the effectiveness and supremacy of federal law.

The Constitutional text itself makes clear that Congress is free to decide that there should be no lower federal courts at all. This would leave all questions of federal law (including the enforcement of federal rights) wholly to the state courts in the first instance, subject to review in the United States Supreme Court. But the purpose of the compromise imbedded in Article III goes further than giving the Congress the all-or-nothing power to decide whether lower federal courts should exist. It leaves it to Congress to decide, having created lower federal courts, what their jurisdiction should be -- that is, to decide which of the cases to which the federal judicial power extends should be litigated in the lower federal courts.

The position that Congress has this additional power to "pick and choose," to create lower federal courts and give them less than the entire federal judicial power, is not based primarily on the mechanical argument that the greater power (not to create such courts at all) must include the lesser (to create them but limit their jurisdiction). It is based on the fact that this reading is the only one consistent with the understanding which animated the compromise adopted by the Framers. The essence of that compromise was an agreement that the question of access to the lower federal courts as a way of assuring the effectiveness of federal law should not be constituted a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment, to be made from time to time in the light of particular circumstances. It would make nonsense of that notion to hold that the only power to be exercised is the all-or-nothing power to decide whether none or all of the cases to which the federal judicial power extends need the haven of a lower federal court. The whole point of the compromise was the insight that the question whether a given "federal" case should initiate in a state court (subject to Supreme Court review), or in a lower federal court, is not an appropriate question for decision at the constitutional level, that Congress is the body best suited to make this institutional judgment on the basis of changing circumstances.

B.

The position that the Constitution obligates Congress to create lower federal courts, or (having created them) to vest them with some or all of the jurisdiction authorized by Article III, has been repudiated by an unbroken line of authoritative judicial and legislative precedent. From the very first Congress has acted on the premise that it is for it to decide which if any of the cases and controversies to which the federal judicial power extends should be litigated in the first instance in lower federal courts. The First Judiciary Act, passed by a Congress whose membership included many of the Framers, created lower federal courts but gave them only a small portion of the federal judicial power. Cases arising under federal law could not generally be brought in the lower federal courts until 1875; and even thereafter, a jurisdictional amount limit put many such cases in the exclusive original jurisdiction of the state courts.

Nor has this exercise of Congressional power been a one-way ratchet. Congress has consistently felt free to restrict lower court jurisdiction even after it has been given. It has on numerous occasions raised the jurisdictional amount. It has both expanded and restricted the diversity and removal jurisdictions. It has excluded from the jurisdiction of the lower federal courts special categories of cases -- most significantly in measures such as the Norris LaGuardia Act, the Johnson Act of 1934, and Tax Injunction Act of 1937.

Further -- and notwithstanding contrary dicta by Justice Story in Martin v. Hunter's Lessee -- the Supreme Court has upheld Congress' exercise of this power in an unbroken line of authoritative precedent. Indeed, the dramatic fact is that not a single Supreme Court case can be cited which casts the slightest doubt whatever on the validity of the hundreds of statutes which have been premised on the notion that it is for Congress to decide which if any of the cases to which the federal judicial power extends should be litigated in the first instance in the lower federal courts.

The most recent authoritative statement of the meaning of the Constitution in this respect is the opinion of the Supreme Court in Palmore v. United States, 411 U.S. 389 (1973). Here is the relevant passage:

> Article III describes the judicial

power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested "in such inferior Courts as the Congress may from time to time ordain and establish." The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III. "[T]he judicial power of the United States.....is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court).....and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Cary v. Curtis, 3 How. 236, 245 (1845).[9] Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.

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9 This was the view of the Court prior to Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). Turner v. Bank of North America, 4 Dall. 8 (1799); United States v. Hudson, 7 Cranch 32 (1812). And the contrary statements in Hunter's Lessee, supra, at 327-339, did not survive later cases. See for example, in addition to Cary v. Curtis, 3 How. 236 (1845), quoted in the text, Rhode Island v. Massachusetts, 12 Pet. 657, 721-722 (1838); Sheldon v. Sill, 8 How. 441 (1850); Case of the Sewing Machine Companies, 18 Wall. 553, 577-578 (1874); Kline v. Burke Construction Co., 260 U.S. 226, 233-234 (1922).

In light of this clear -- and consistent -- line of authority in the Supreme Court, occasional lower-court dicta which espouse the opposite view do not have authoritative weight.

C.

You will have noticed, I hope, that I am not arguing that Congress has plenary power to determine what if any rights shall be enforceable in court. I believe that the Constitution does guarantee that, under certain circumstances, there shall be access to courts, that due process does in some cases mean judicial process. (It is, consequently, my opinion that Congress is not free to control the jurisdiction of the state courts so as to foreclose the vindication of the constitutional right to judicial review.) But the Constitution is indifferent whether that access is to a federal or a state court. If the Congress decides that a certain category of case arising under federal law should be litigated in a state court, subject to Supreme Court review, neither the letter nor the spirit of the Constitution has been violated. What has happened is that Congress has taken up one of the precise options which the Constitutional Framers specifically envisaged. From the viewpoint of the Constitution, nothing has gone awry.

D.

It is a commonplace that the Congress' power to regulate the jurisdiction of the lower federal courts cannot be exercised in a manner which violates some other Constitutional rule. In that sense -- and in that sense only -- it can be said that Congress' power is not plenary. Thus if Congress provides that only Catholics may bring suits in the lower federal courts, this would be invalid -- not because non-Catholics have a constitutional right of access to lower federal courts, but because the Constitution prohibits any Congressional action which discriminates among religious denominations. Similarly, a statute which said that Whites only may resort to the district courts would be invalid. The reason, again, is that, in the absence of some compelling and valid purpose, Congress is not free to make distinctions among the races for any purpose whatever.

Furthermore, I would concede that a Congressional statute which regulated the lower courts' jurisdiction in a wholly arbitrary manner ("only plaintiffs who are more than six feet tall may sue in the district courts") would violate the Due Process Clause.

It is, however, a fundamental and egregious mistake to broaden this argument into an assertion that Congress is not free to differentiate among different subject matters, and to specify categories of cases arising under federal law which may or may not be brought to the lower federal courts. Unlike legislation which makes distinctions on the basis of race or religion, there is no independent constitutional rule which says, absolutely or presumptively, that various categories of federal question litigation must somehow be treated jurisdictionally alike. There is no independent constitutional value which says that it is absolutely or presumptively illegitimate or undesirable or suspect to decide that one category of federal right shall be enforced originally exclusively in the state courts, whereas another may be litigated in the lower federal courts. Indeed, it was the very purpose of the Article III compromise to give Congress the power to make precisely these distinctions.

I therefore have no doubt whatever that a statute which provided that cases challenging the validity of state legislative apportionments, or cases challenging the validity of state statutes regulating abortions, may not be brought in the lower federal courts (but must be litigated initially in the state courts, subject always to Supreme Court review), would, if technically correctly drafted, be invulnerable to constitutional challenge. (I stress that there are difficult technical problems in drafting such statutes so as to survive challenge. Congress is free to decide that a lower federal court may not hear a given category of case or controversy at all. But it cannot allow such a court to take jurisdiction and then command it to decide the case in an unconstitutional manner. Intricate problems of draftsmanship, therefore, arise when statutes seek to remove federal court jurisdiction over certain types of questions.) Such a statute would, if correctly drafted, be valid because it would exemplify the very power which the Framers sought to give Congress: the power to decide that federal interests are best maintained by requiring certain cases to which the federal judicial power extends to be initiated in the state -- rather than the lower federal -- courts.

## E.

I have heard various arguments contrary to this position, but find none of them impressive.

(a) The argument advanced by Justice Story, that Article III requires the Congress to vest the entire quantum of federal judicial power in federal courts, has been rejected by an unbroken line of Congressional and Supreme Court precedents, running from the time of the first Congress to the present. It no longer deserves to be taken seriously.

(b) It is sometimes argued that, notwithstanding the clearly expressed plan of the Framers, changing circumstances show that lower federal courts are an absolute necessity and that we should therefore override the original understanding and restrict Congress' power. The argument seems to me to be wholly illegitimate and without authority. Indeed the argument refutes itself: the fact that circumstances are, today, different than they were in 1789 with respect to the need for and role of lower federal courts, supports the wisdom of the Framers' compromise rather than furnishing an excuse for its abandonment.

(c) It is sometimes asserted that Congress does not have the authority to carve out special categories of cases arising under federal law and remit those to the exclusive original jurisdiction of the state courts. It is unclear just why this is asserted to be so. If it is asserted that this "discriminates" against a certain category of federal right, the answer must be that such discriminations -- that is, the power to pick and choose among different categories and subject matters of federal cases -- is precisely the power that Article III sought to grant. Ultimately the assertion must rest on the notion that there is a constitutional right as such to litigate certain categories of cases in the lower federal courts -- a notion which seems to me to be plainly erroneous.

(d) A somewhat narrower argument is that if it is shown that Congress' motive in requiring a certain category of case to be brought in the exclusive original jurisdiction of the state courts is "hostility" to the substantive constitutional right in question, it can be struck down. But I do not understand how such a rule could be administered. What would be an adequate indication of hostility? The New Deal Congress, in 1934 and again in 1937, moved by serious reservations about the constitutional doctrines which restricted the states' regulatory and taxing authority under the Due Process Clause, provided that constitutional suits to restrain the enforcement of state tax statutes and public utility rate orders must ordinarily be brought in the state courts. Are these statutes invalid? No court or commentator -- and certainly no "liberal" -- has so suggested in the past 40 years. Why is a statute, providing that suits to restrain the enforcement of a state statutes regulating abortions must be brought in the state courts, different?

The fact is that the notion that it is illegitimate for Congress to express concerns about substantive constitutional matters through the technique of jurisdictional regulation is itself erroneous. That is just what Congress did, as I just said, in the Johnson Act of 1934 and the Tax Injunction Act of 1937. (It acted in an analogous manner in the Norris LaGuardia Act.) Such jurisdictional statutes rest on a rational and legitimate notion: that our federalism benefits if certain types of constitutional issues are subjected to the insights of the state (rather than the lower federal) courts before they reach the United States Supreme Court. The state courts, equally with the federal, are charged with the task of enforcing and protecting federal constitutional rights. To give them the task of doing so -- subject to Supreme Court review -- may manifest concern with or even disagreement with existing constitutional doctrine, but does not subvert it. Such a decision may quite legitimately rest on two allied notions: that in interpreting the constitutional provisions which restrict state power, it may be wise in the first instance to have access to the insights of the tribunals which are closest to the problem at hand; and, second, that it may be politically healthy to give the state courts the opportunity in the first instance to enforce federal constitutional restrictions on state power.

### F.

I conclude that a correctly drafted statute which does nothing more than provide that a given category of case or controversy arising under the Federal Constitution or laws shall revert to the exclusive original jurisdiction of the state courts is valid,* so long as it does not create discriminations which the Constitution independently prohibits and is not wholly irrational and arbitrary. More particularly, my submission is that it is clearly within Congress' power to determine that certain categories of constitutional litigation must in the first instance be brought in the state courts, subject to Supreme Court review.

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* I am assuming that the case is not within the Supreme Court's original jurisdiction.

G.

I should stress that the fact that Congress has power to do something is not an argument that it should exercise that power. Nothing in my testimony should be taken to be an endorsement of any particular proposal with regard to the jurisdiction of the lower federal courts. Indeed, my general view is that Congress should be most cautious in creating special jurisdictional rules for special categories of constitutional litigation. It seems to me that such statutes are dangerous because they seem to be premised on the very argument which animates those who assert that Congress lacks this power -- the argument that state courts may be expected to give federal constitutional rights less vigorous enforcement than the lower federal courts.

On the other hand, this kind of jurisdictional regulation is quite legitimate if it is the conscientious judgment of Congress that a given category of federal constitutional litigation may benefit from the special insights which state courts can provide into matters that touch closely the regulatory and political authority of the states. And I stress again the point with which I started. The Constitution has relatively few things in it which are clear; it seems to be most regrettable that law professors should try to muddy even such clear waters. There are many legitimate reasons for not favoring legislation that restricts the power of the lower federal courts to adjudicate abortion cases, or apportionment cases, or some other category of cases. But doubts about Congress' power to enact these statutes is not one of them.

## II.

## Congress' Power over the Appellate Jurisdiction of the Supreme Court

I shall be brief on the second question to be discussed, namely, the power of Congress to control the jurisdiction of the United States Supreme Court. This question seems to me much more difficult than the question of lower court jurisdiction. Unlike the latter question, the answer to it is by no means clear.

### A.

The difficulty is created by the following circumstance. The text of the Constitution provides that the appellate jurisdiction of the Supreme Court shall be subject to "such Exceptions, and under such Regulations as the Congress shall make." This language plainly indicates that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the appellate jurisdiction, it has the authority to do so. If the Constitution means what it says, it means that Congress can make the state courts -- or, indeed, the lower federal courts -- the ultimate authority for the decision of any category of case to which the federal judicial power extends.

What is so troubling about that position, however, is that such a jurisdictional withdrawal would create a system which is inconsistent with the structure which the Framers assumed to be appropriate. The "states' rights" argument at the Constitutional Convention was that there was no need for lower federal courts precisely because the appellate jurisdiction of the Supreme Court would provide sufficient assurance of the supremacy and uniformity of federal law in cases decided by the state courts. It was the premise of this argument that the Supreme Court would have the power to review cases in the state courts which concern issues of federal law. It was plainly not contemplated that the system could work effectively with the state courts as courts of last resort on issues of federal law. Even on the assumption that the state courts would comply with the Supremacy Clause and conscientiously enforce the Federal Constitution and laws, the insuperable problem would be that there would be no way to make the commands of federal law uniform as well as supreme.

I stated before that a statute providing that an important category of constitutional litigation is to be within the exclusive original jurisdiction of the state courts would not violate the letter or the spirit of the Constitution. My submission is that a statute depriving the Supreme Court of appellate jurisdiction over the same category of constitutional litigation would violate the spirit of the Constitution even if it does not violate its letter. It violates the spirit because the structure contemplated by the instrument makes sense -- and was thought to make sense -- only on the premise that there would be a federal Supreme Court which would have the power to pronounce uniform and authoritative rules of federal law.

B.

Does it make sense to say that there may be things which do not formally violate the Constitution -- which comply with its letter, and therefore are not "invalid" -- which nevertheless violate its spirit? The answer is clearly "yes." Congress has undoubted power to pack the Supreme Court by making it a court of 15, 20, or even 50 Justices. A statute so doing could not be held invalid. But there is no doubt that such a statute would violate the Constitution's spirit -- that it would run against the purpose of the Framers to create an independent judiciary.

I thus am not at all embarrassed if I am forced to conclude that Congress may have the authority to carve out subject matters and withdraw them from the Supreme Court's appellate jurisdiction, but should not do so, not only because they represent bad policy but because they violate the structural spirit of the instrument.

### C.

Should one go further and adopt the position that Congress does not have the power to carve out areas of federal-question or constitutional litigation from the appellate jurisdiction of the Supreme Court?

Various arguments have been advanced which would limit the powers of Congress to create exceptions to the appellate jurisdiction of the Supreme Court in a variety of ways. Some of the arguments are historical -- they assert that the power to make exceptions was intended by the Framers to be restricted to questions of fact. Other arguments depend on the assertion that to allow Congress such a power would subvert the fundamental Constitutional plan.

There are major weaknesses and flaws in all of these arguments. The historical evidence is far from conclusive, but the evidence to support the proposition that the exceptions clause was to be reserved exclusively to issues of fact is weak. Arguments which derive from "structural" notions are also weak, primarily because they are so vague, particularly in the face of a text which is not at all vague. True, there is evidence that the Framers generally contemplated Supreme Court review of state court judgments. But they also contemplated Congressional regulation of this jurisdiction, and nothing in the "structure of the document" argument serves in any powerful way to distinguish between regulations which are valid and those which are invalid.

In this connection, it must be remembered that Congress has in fact made major exceptions in the appellate jurisdiction of the Supreme Court. For a century federal criminal cases were not generally reviewable in the Supreme Court; if the critical feature of the "structural argument" is the need for uniformity, this gap would plainly be invalid. Indeed, for some 100 years, state court decisions on issues of federal law were themselves reviewable only on a limited basis, depending on how the state court decided the federal question. Congress also, on one occasion, made an exception to the appellate jurisdiction of the Supreme Court on an ad hoc "retaliatory" basis; and this statute was upheld in the celebrated McCardle case, 7 Wall. 506 (1869). It has often been pointed out that McCardle is special and distinguishable; nevertheless, the language of the Court in McCardle plainly proceeded on the assumption that Congress' power is plenary; and this is the only Supreme Court opinion squarely on point.

My own opinion is that the arguments which would place serious limits on the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court are not, in the end, persuasive. Indeed, a powerful case can be made that such a plenary power may be essential to making the institution of judicial review tolerable in a democratic society.

Nevertheless, it is clear that the contours of the exceptions clause remain shrouded in considerable doubt. Congress may have the power to make the state courts the courts of last resort in important categories of constitutional litigation; but its power to do so is not at all free from ambiguity. Furthermore, even if one believes -- as I do -- that Congress has the raw power to do this, the argument that it would violate the spirit of the instrument to do so seems to me to be extremely powerful. I note, too, the powerful policy arguments against such a retaliatory use of the power granted to Congress by the exceptions clause. I do not believe that it could long be tolerated to have the Federal Constitution be subject to different interpretations in different states on any issue of significance. Nor would we find it tolerable to have the law "frozen" permanently into the shape given it by the last Supreme Court precedents rendered before the enactment of the statute withdrawing jurisdiction -- precedents which would continue to be binding authority in the state courts (and which, ironically, are likely to be the very precedents which led to the Congressional dissatisfaction manifested in the new jurisdictional statute).

I conclude, in other words, that resort to the power to make exceptions to the appellate jurisdiction of the United States Supreme Court by making the state courts the courts of last resort in one or more important categories of constitutional litigation is a dubious expedient. The validity of such a measure would be surrounded by serious doubts. Such a measure would in any event be criticized as flying in the face of the spirit of the Constitution; its legitimacy would therefore be extremely vulnerable, as was the proposal of President Roosevelt to "pack" the Supreme Court. And, finally, such a measure would create a host of serious and perhaps intolerable problems in the fair and rational administration of the laws.

Senator HATCH. As our concluding witness today—a day, I might add, when the subcommittee is particularly focused on the limits of Congress power and tomorrow we will examine in more detail the elements of the power—will be Prof. Telford Taylor, Nash Professor of Law at Columbia University.

Professor Taylor will be representing the American Civil Liberties Union.

We are grateful to have one of your high and respected reputation here with the subcommittee today, as we have the other witnesses.

Before you begin, may I once again remind our witnesses that we do not desire at this time to discuss the specific merits of any of the bills before the Senate to actually implement the exceptions clause.

We intend today to take the more fundamental, and certainly preliminary step, of examining the range of that authority.

Professor Taylor, we are anxious to hear your testimony. We are looking forward to it.

## STATEMENT OF TELFORD TAYLOR, PROFESSOR OF LAW, COLUMBIA UNIVERSITY, REPRESENTING THE AMERICAN CIVIL LIBERTIES UNION

Dr. TAYLOR. Thank you, Mr. Chairman.

As you have stated, Mr. Chairman, I am here at the request of the Civil Liberties Union.

I should say at the outset that although our general conclusions about the problem here are the same, the details of my testimony are my own and may or may not represent their views.

I am very grateful to the prior witnesses who have enabled me to abbreviate what I had to say, especially the early part of Professor Bator's presentation about the history of article III of the Constitution, which I think he stated accurately and clearly; so I will be able to pass over some of the things I would otherwise have gone into—though they are in the written statement which I shall give to you.

Senator HATCH. That statement will be included in the record in its entirety at the completion of your oral presentation.

Dr. TAYLOR. Thank you, Mr. Chairman.

I will abide by the preference of the committee and will not focus my remarks on a particular piece of legislation.

I should like at the outset to make a few comments about the bills in general that I have seen in this connection, because some of them restrict only the jurisdiction of the lower Federal courts. Indeed, they are limited in some cases to withdrawing jurisdiction to use equitable remedies, such as injunctions and declaratory judgments.

Other bills also diminish the Supreme Court's appellate jurisdiction. I believe there is one bill which undertakes to withdraw jurisdiction from the State courts as well.

All these bills, whether they are narrow or broad in the courts to which they apply, or nearly all of them, do share one feature which is that they single out a particular constitutional right and withdraw from the courts to which they refer jurisdiction to entertain litigation for the vindication of those rights.

It is in that singling out process that I find the constitutional defect to which my remarks will be primarily devoted.

I, therefore, propose to focus my remarks on the more narrowly drawn bills which withdraw jurisdiction only from the lower Federal courts. Therefore, I will be talking primarily about section 1 of article III, rather than the appellate jurisdiction of the Supreme Court.

The approach that I take on this matter would apply equally to the Supreme Court. What I have to say about the lower Federal courts would apply a fortiori to these other judicial areas.

As I have mentioned, the history portrayed by Professor Bator I think is entirely accurate. My constitutional arguments here do not at all rest on the thought that the jurisdiction of Congress, or the power of Congress over lower Federal court jurisdiction, is anything but broad and plenary.

The Supreme Court itself has said that this jurisdiction is plenary, and I have no quarrel with that view.

It is like the Interstate Commerce power which has been very broadly interpreted. Despite the enormous volume of congressional legislation in that field, not since 1936 has any statute been held unconstitutional as beyond that power.

Senator HATCH. That certainly is broad and extended in its outreach—the commerce clause. There is hardly anything that does not come under its umbrella today.

Dr. TAYLOR. It certainly does not come under its umbrella. It is an independent power, derived from article III and not from article I of the Constitution.

All I mean to say is that both powers are ample and should be given an enormous amount of elbow room and scope. I have no quarrel with that.

I would agree that as a matter of constitutional theory, Congress could entirely abolish the lower Federal courts. They could bring us back to the situation of 1875 when there was no Federal jurisdiction.

Of course, I think the policy arguments against that are very, very strong. A decision by Congress in 1789 not to create lower Federal courts is not at all the same as a decision in 1981 to limit them or seriously withdraw jurisdiction after we have had them for two centuries. Since 1875, they have been a very important part of the machinery.

The point which I was glad to see Professor Bator agrees with me on is, however, that this power, though plenary, is subject to the other provisions of the Constitution. If one finds elsewhere—whether in the Bill of Rights or elsewhere—a specific limitation on congressional power, that applies, whether we are talking about the commerce power or whether we are talking about the power over the jurisdiction of the lower Federal courts.

I believe that that was quite thoroughly established by the *Klein* case, which the chairman mentioned earlier in the session.

One of the two reasons for which the Supreme Court declined to recognize or respect the withdrawal of jurisdiction was that its inevitable effect was to deny the effect of Presidential pardons. Presidential pardons are authorized by article II of the Constitution.

The Supreme Court said that this withdrawal of jurisdiction would nullify and frustrate the President's pardon power. That was a limitation which the Court had to observe and, therefore, did not respect the jurisdictional denial.

It is in line with that principle, I think, that jurisdictional statutes, like others, must conform to the requirements of other constitutional limitations that I find the problem with these bills that single out particular individual constitutional rights.

The idea of using jurisdictional withdrawals to limit or reverse the effect of Supreme Court decisions that are controversial and disapproved of by many is, of course, not new.

Especially in the 1950's and 1960's, there were many bills introduced that resembled the bills I am discussing this morning. None of them was passed.

It seems to me, at least in my view, that Congress has demonstrated a very commendable restraint in recognizing that the use of jurisdictional withdrawals for these purposes is a dangerous game. It can be played at both ends of the political spectrum.

If such legislation takes hold and is enacted and becomes a way of life, the result will not be to insure the dominance of a particular political viewpoint but to effect a very revolutionary change in the relation between the branches of the Federal Government.

Therefore, it seems to me that the essential defects of these bills which select certain rights to withdraw from jurisdiction, whether it be the lower Federal courts or the Supreme Court, suffer from the defect that on their face they are intended to make more difficult the vindication of a constitutional right.

This argument or point would be equally applicable whether or not State court jurisdiction is also withdrawn.

I am, of course, aware of the many Supreme Court decisions in which the Court has stated that legislation must be assessed on its face; that one cannot go behind the face of the legislation to determine hidden motives.

As Professor Ratner remarked, the limits of that doctrine are somewhat foggy. But there it is, and it has wide application.

However, there are many exceptions to it. For example, with the equal protection clause for many years it has been the rule that a law does not violate the equal protection clause unless its purpose is to discriminate.

The mere fact that it has a discriminatory impact is not enough.

In those cases, the courts commonly are obliged to look into the statute and, if necessary, behind it to determine whether there is a discriminatory purpose or not.

With these bills, which have been introduced at the present session, some of the sponsors of this legislation have been very commendably frank that the purpose of the bills, as one of the Senators sponsoring some of the legislation has put it, is to overturn the effect of the Supreme Court's decision in *Roe* v. *Wade*.

That, of course, is an extraneous point. I do not in any way rely on these statements by individual Senators as the basis for my objection.

It seems to me that although these bills do not say on their face that their purpose is to deny or limit or truncate constitutional rights, they show on their face that that is in fact the purpose.

I would draw the committee's attention, as I do in my written statement, to a case that is closely applicable. It is the *Gomillion* case in which the Alabama Legislature had passed a statute which redrew the city limits of Tuskogee which had been in the form of a square.

By the new legislation, as the Supreme Court put it, the limits were changed to a "grotesque 28-sided figure."

There is nothing in that legislation that said that the purpose was to discriminate. Examining the contours of the city as changed, it was quite plain that the result would have been to exclude from residents in Tuskogee all blacks with the exception, I believe, of four. It would not have excluded any whites.

The Supreme Court's decision was that in this situation, although the statute did not say that this was its purpose, the inevitable effect of it displayed a purpose to discriminate.

With these bills, it seems to me that it is clear again that they do not have what I would call a jurisdictional purpose. They do say they withdraw jurisdiction; but they are not bills which are intended to diminish the volume of Federal litigation, because it is overburdening the Federal courts. They are not bills which can seriously be regarded as intended to put more jurisdiction into the State courts.

The bills dealing with free exercise or dealing with abortion and the cases here are an infinitesimal part of Federal jurisdiction.

It seems plain to me that the only purpose of the bills, as disclosed on the face, is to make it more difficult to vindicate those rights.

I would like to examine in conclusion some of the few situations in the past where Congress has undertaken to do something like what these bills before the Congress now undertake to accomplish.

Professor Bator mentioned the Norris-La Guardia Act. There has been mention of the price control legislation. I am going to mention those and then one other act—the so-called Portal-to-Portal Act, which do bear on the problem I am dealing with.

The Norris-La Guardia Act, which was passed in 1932, did withdraw the equity jurisdiction from Federal courts in labor disputes. It did not withdraw it completely, but it regulated it and put limitations on it. It did not go as far as these bills in eliminating it completely, but it was a far-reaching congressional exercise of power over the equity jurisdiction in Federal courts.

In that respect, it closely resembled several of the bills before Congress now. Therefore, I think it warrants particular comment.

In the first place, although that legislation was passed, the Supreme Court never did pass on the constitutionality of the most difficult part of it. To a large extent, that measure was not concerned with constitutional rights.

The one case in which the Supreme Court did mention the Norris-La Guardia Act had to do only with the question of what constituted a labor dispute within the meaning of the statute. It was a purely statutory question.

The court did say that the power of Congress to regulate the Federal jurisdiction is unchallenged.

The difficult problem in the Norris-La Guardia Act was that it withdrew jurisdiction to enforce what were then called yellow dog contracts—contracts in which the employer insisted on an agreement from his employees not to join unions.

Those statutes outlawing yellow dog contracts had been declared unconstitutional by the Supreme Court in some earlier decisions. Therefore, it could be argued that in withdrawing the jurisdiction to issue injunctions against those contracts, Congress was interfering with the vindication of a right—the employer's right—to have such contracts.

The Supreme Court never touched that issue. It is a fact that those old decisions, validating yellow dog contracts and protecting them, were overruled in 1941, about a decade later. It is also plain that they were in poor constitutional health much earlier.

My conclusion, after looking quite carefully into the reports and the cases and the legislative history of the Norris-La Guardia Act, is that they do not embody any serious support for the kinds of bills that are before this and other subcommittees now.

The emergency price control legislation, which was an outgrowth, of course, of war-time necessity, also embodied the withdrawal of equity jurisdiction to protect persons contesting the validity of price regulations.

Those were upheld by the Supreme Court but very explicitly, on the basis of war-time emergency—what I would call a compelling State interest.

I have not seen an invocation of comparable interests as justification for the bills now under scrutiny.

The Portal-to-Portal Act grew out of a Supreme Court decision which had interpreted prior Federal legislation as authorizing mine laborers to be paid for the time they traveled underground.

After that decision, it was figured that this might involve as much as $5 billion of back pay with the threat of bankruptcy to many companies and a drain on the Federal Treasury.

For that reason, Congress did enact what I think is the most extensive withdrawal of court jurisdiction that Congress has ever put into law.

It was a total withdrawal of jurisdiction from all courts—State and Federal—right across the board.

Those cases—the cases dealing with the constitutionality of that statute—never reached the Supreme Court. The Supreme Court had opportunity to pass on it, but denied certiorari.

The lower Federal courts that handled cases attacking the constitutionality of the Portal-to-Portal Act unanimously held that no constitutional right had been violated.

They upheld the constitutionality of the act, quite independently of the withdrawal of jurisdiction.

I would like to read a very short quotation from the decision of the second circuit court of appeals, a very distinguished panel, in a case cited in my written presentation.

> A few of the district court decisions sustaining the Portal-to-Portal Act have done so on the ground that since jurisdiction of Federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part.
>
> We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the fifth amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law, or to take private property without just compensation.

That statement by the second circuit is squarely in line with the position I am taking in this appearance.

I would like to make just one more point in closing.

These narrowly drawn bills leave the State jurisdiction intact. Professor Bator especially has leaned on that circumstance to justify his view that these bills would be constitutional if properly drawn.

With all due respect to him, I find it very difficult to take that argument seriously. It seems to me that the constitutionality of a bill withdrawing Federal jurisdiction must be determined, irrespective of the question of whether the State courts remain open.

I do not mean that that is an irrelevant consideration.

In a case where you have an important State interest at stake here, the fact that the protection of a constitutional right is not totally withdrawn but remitted to the State courts, of course, may be important.

Certainly, and I am sure Professor Bator would agree, a bill which restricted Federal jurisdiction only to whites and said that blacks would have to vindicate their rights in the State courts would be plainly unconstitutional.

I think the same argument applies very generally to these bills.

What they are doing is make more difficult the vindication of constitutional rights, which the Supreme Court has declared here in the due process clause or the free exercise clause.

It is on the basis that this purpose appears squarely on the face of those statutes that I rest my conclusion that, if enacted, they would be unconstitutional.

Mr. Chairman, I have not made any mention of the exceptions and regulations clause respecting the Supreme Court. Since it is plain the committee is interested in that, I will take 2 more minutes and indicate my views there.

I think, in general, that I agree with most of what Professor Bator has said. I, too, think that this scheme of the Constitution is a pretty wooly idea. I think it is also clear that the language of the exceptions and regulations clause is so different from the language of section I on the lower Federal courts that it is plain that the Constitution intended that there would be a substantial appellate jurisdiction in the Supreme Court.

Unlike article I, which would envisage the total abolition of Federal courts and remit Federal questions to the State courts, the language here of exceptions and regulations plainly, I think, connotes that Congress would not deny on a broad basis the appellate jurisdiction of the Supreme Court.

Especially if lower Federal court jurisdiction is restricted, the role of the Supreme Court in insuring uniformity would be so vital that jurisdiction over State court decisions does seem to me an inherently necessary part of the constitutional scheme.

Therefore, I think I would, though painfully, come down on the other side of the fence than Professor Bator on a broad withdrawal like that.

The arguments I have put forward here about the purpose of legislation, if it is plain that the purpose is to obstruct the vindication of constitutional right, those would apply equally to cases in the appellate jurisdiction of the Supreme Court. Therefore, my views there would follow a fortiori from what I have said about the lower Federal courts.

My written statement was drawn before I was fully informed about the limitations of the hearing. I will, if the committee wishes, undertake to modify it in accordance with those.

Senator HATCH. We will be happy to have your full statement in the record, and you have been very literate on your point of view. We have enjoyed it very much.

A statement by Chief Justice John Marshall suggested a very interesting question.

Marshall said in *Gibbons* v. *Ogden*, an 1824 case, in reference to the commerce clause:

> This power like all others vested in the Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this as in many other instances as that, for example, of declaring war, the sole restraints on which they have relief, to secure them from its abuse.

We know the limits, or the lack of limits, read into the commerce clause.

In view of Marshall's language, how would you distinguish the commerce clause from the exceptions clause. Neither of them has any expressed limits, as Marshall said. Cannot Congress use one just as widely as the other if it so chooses?

Dr. TAYLOR. It seems to me, Mr. Chairman, that the answer to that would have to be drawn from the entire context of the Constitution.

The commerce power is listed among a number of powers of Congress that are obviously intended to give the Federal Congress a broad share in the regulation of the country's economy, taxation, and so forth.

The contrast which I have mentioned, however, between the exceptions and regulations clause and the section 1 on the lower Federal courts, I think is proof that the exceptions and regulations clause cannot be equated in that respect with the commerce power.

The exceptions and regulations clause is construable as saying that the Supreme Court would have, in the absence of congressional action, full range of appellate power.

The Supreme Court decided very early otherwise, and held that it only had such jurisdiction as the Congress explicitly gives it. That has been well-established since the early 19th century.

That, I think, must respond to the structural arguments that both Professor Bator and Professor Ratner made. It would involve such an enormous upset in the relations between the States and the Federal Government that the exceptions and regulations clause must be given a limited effect.

Senator HATCH. Thank you.

We are going to keep the record open for other colleagues and members of this committee to submit questions.

[The prepared statement of Telfor Taylor, a letter from Senator Baucus with subsequent reply, questions from Senator Leahy with subsequent reply follows:]

## PREPARED STATEMENT OF TELFORD TAYLOR

My name is Telford Taylor. I am a lawyer, admitted to practice in the District of Columbia, New York State, and various federal courts including the Supreme Court of the United States. I have been at the bar for 47 years, first as a federal government attorney (1933-42), and since 1952 as a private practioner. In recent years I have been principally occupied with law school instruction, and have conducted classes and seminars at the Yale, Columbia, Harvard, University of Colorado, and Benjamin Cardozo Law Schools. I am presently Nash Professor Emeritus at the Columbia Law School and Kaiser Professor of Constitutional Law at the Cardozo Law School.

Throughout these years I have been primarily concerned with federal, including federal constitutional, law, and I have conducted classes in constitutional law at all of the above-named institutions, and in every year since 1963.

I am appearing here on behalf of the American Civil Liberties Union, in order to discuss the extent of congressional power over federal court jurisdiction. I am aware that there are a number of pending bills which withdraw court jurisdiction in a variety of ways. But I believe it would be most helpful if I focus my testimony on one of the most narrowly drawn bills, since what I have to say about it will apply a fortiori to bills which will withdraw even more jurisdiction. So I will direct my remarks to S. 158, introduced by Senator Helms, which undertakes to withdraw from the lower federal courts jurisdiction to issue injunctions and declaratory judgments in cases involving state laws which prohibit or limit the performance of abortions. I share with the ACLU the view that this provision, if enacted into law, would be unconstitutional. But I am not a member of or bound by the views of the ACLU, and the particular contents of this statement do not necessarily reflect their opinions.

## 1. Congress and the Inferior Federal Courts

My opposition to the jurisdictional provisions of S.158 is not based upon a narrow view of Congressional power in this field. The Supreme Court has explicitly recognized that Congress has "plenary control over the jurisdiction of the federal courts." Bro. of R. Trainmen v. Toledo, P. & W. R. Co., 321 U.S. 50, 63-64 (1944). This is in accord with the history and language of Article III of the Constitution, Section 1 of which vests the judicial power in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." It is generally understood that this wording embodied a compromise between those among the framers who favored and those who opposed establishment of a federal court system. Thus the decision between the two alternatives was not mandated by the Constitution itself, and it was left up to Congress to handle by statute.

It thus appears that it would have been entirely constitutional for Congress to establish no "inferior" federal courts at all. And although the First Congress did in fact establish the district and circuit courts, the First Judiciary Act gave them a range of jurisdiction which, by today's standards, was very narrow.

Accordingly, if we were to look to the intentions of the framers, Congress could constitutionally conclude and legislate extensive curtailment, or even abolition, of inferior federal court jurisdiction. Of course, from a practical standpoint, a decision not to make inferior federal courts in 1791 would have been quite different from a decision to abolish them in 1981, after we have had federal courts for nearly two centuries, and after more than a century during which they have become a major part of the nation's judicial machinery. These practical considerations have led one commentator to conclude that: "Abolition of the lower federal courts is no longer constitutionally permissible . . . . the jurisdiction of these courts is not a matter solely within the discretion of Congress." Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974).

While I think all would agree that today the abolition of the lower federal courts, or deep inroads into their jurisdiction, would be extremely unwise, and indeed destructively revolutionary, of course S.158 is, quantitatively, a very limited withdrawal. My opposition to it, and my conclusion that it is unconstitutional, does not rest upon the proposition that there are quantitative constitutional limits on Congressional power over inferior federal court jurisdiction. That power is, as stated by the Supreme Court, "plenary," like, for example, Congressional power to regulate interstate commerce.

## 2. Constitutional Limitations on Congressional Power

But to say that Congressional power over lower federal court jurisdiction is "plenary" does not mean that it is immune from the general limitations on Congressional power found elsewhere in the Constitution, including the several amendments. Congress specifies the jurisdiction by enacting statutes, and those statutes are no more immune from constitutional scrutiny than any others.

The Congressional power over interstate commerce is so ample that, despite the enormous proliferation of federal legislation, not since 1936 has a federal regulation of commerce been held unconstitutional. Yet nothing is better settled than that this power is subject to constitutional limitations such as the First Amendment and the due process clause of the Fifth Amendment. Were Congress to enact statutes forbidding interstate carriers to transport literature reflecting a particular political persuasion, or goods owned by members of a particular race or adherents of a religion, these statutes would undeniably be regulations of interstate commerce, but they would be constitutionally invalid under the First or Fifth Amendments.

The same principle applies to the exercise of Congressional power under Article III. A statute withdrawing from the federal courts jurisdiction to issue injunctions at the suit of individuals identified with particular political, racial, or religious groups would be manifestly unconstitutional under those same amendments.

These conclusions, I believe, follow inevitably from the language and structure of the Constitution. See Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935): "The bankruptcy power, like the other great substantive powers, is subject to the Fifth Amendment." That there are few precedents in the jurisdictional field is, therefore, hardly surprising. But sufficient precedent is not lacking, for the foregoing conclusions are amply and explicitly supported by the decision and opinion in United States v. Klein, 13 Wall. 128 (1872). In that case, the Court of Claims had been given jurisdiction to determine, subject to Supreme Court review, claims to recover property taken by military action during the War Between the States. Some such claimants had been adherents of the Confederacy, but had subsequently taken amnesty oaths pursuant to President Lincoln's pardon proclamation. With the purpose of barring such claimants from recovery, Congress in 1870 passed a statute which provided that, if in any such case the claimant relied upon a presidential pardon as proof of eligibility, the Court of Claims or the Supreme Court (as the case might be) should have no further jurisdiction, and should dismiss the claim for want of jurisdiction.

In the Klein case, involving such a claim, the Supreme Court held the 1870 statute unconstitutional, saying that it was not "an exercise of the acknowledged power of Congress" over the Supreme Court's appellate jurisdiction. Two reasons were given of which one, directly relevant here, was that the statute impaired the effect of a pardon, and thus infringed the President's constitutional power under Article II, Section 2 to "grant Reprieves and Pardons for Offenses against the United States." The fact that the 1870 statute was phrased in jurisdictional terms made no difference, since its effect was beyond the power of Congress and violated Section 2 of Article II.

Accordingly, the requirement that statutes enacted by Congress under its Article III powers conform to general constitutional limitations is clearly established, both under the language and structure of the Constitution, and as a matter of decisional precedent. The immediate question is whether Section 2 of S.158 can survive constitutional scrutiny under those principles. For the reasons given hereinafter, I believe that question must be answered in the negative.

### 3. The Purpose of Section 2 of S.158 is constitutionally Impermissible

Section 2 of S.158, like the statute of 1870 involved in the Klein case, is a limitation on federal court jurisdiction. But just as the purpose and effect of the 1870 statute was substantive -- i.e., to nullify the effect of a presidential pardon on war property claims -- so the purpose and effect of Section 2 of S.158 is substantive -- i.e., to make it more difficult than theretofore for individuals to secure their constitutional rights recognized in Roe v. Wade. In neither case is the purpose constitutionally permissible.

Now, of course, I am aware of the many cases in which the Supreme Court has declared and applied the rule that the constitutionality of a statute must be determined on its face, and without inquiry into motives or purposes that underlie the enactment. See, e.g., McCray v. United States, 195 U.S. 27, 56 (1904); Arizona v. California, 283 U.S. 423, 455 (1931); United States v. Darby, 312 U.S. 100, 113-14 (1941); Flemming v. Nestor, 363 U.S. 603, 617 (1960); United States v. O'Brien, 391 U.S. 362, 382-86 (1968). For example, a law prohibiting anyone other than a lawyer from engaging in debt-adjusting will be upheld if a rational and legitimate purpose can be conceived, without going behind the face of the statute to determine whether or not the actual legislative motive was to confer financial benefits on lawyers -- a motive by which legislators, many of whom are lawyers, might be governed. Ferguson v. Skrupa, 372 U.S. 726 (1963).

But there are well-recognized exceptions to that principle. United States v. O'Brien, supra at 383 note 30; Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970). Perhaps the most important one involves the equal protection clause of the Fourteenth Amendment. For many years the Supreme Court has declared the rule that the unequal impact of a statute is not enough to establish a violation of the equal protection clause; there must be a governmental purpose to discriminate. Snowden v. Hughes, 321 U.S. 1 (1944); Keyes v. School District, 413 U.S. 189 (1973); Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); Mobile v. Bolden, 446 U.S. 55 (1980). And it is equally well settled that, in equal protection cases, the courts are not limited to an examination of the statute on its face. Loving v. Virginia, 388 U.S. 1 (1967); Green v. County School Board, 398 U.S. 430 (1968); Columbus Board of Education v. Penick, 443 U.S. 229 (1979). Indeed, the inequality of impact may be so great that a purpose to discriminate may be inferred from that circumstance alone. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Washington v. Davis, supra at 253-54 (Justice Stevens, concurring).

Finally, and perhaps most important for present purposes, the

Court has held that a statute which does not on its face articulate an unlawful purpose, may, because of its language and the context in which it is enacted, disclose on its face an unlawful purpose and an inevitable unlawful effect. Grosjean v. American Press Co., 297 U.S. 233 (1936); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

The Gomillion case involved an Alabama statute enacted in 1957 which changed the boundaries of the City of Tuskegee from a square to what the Supreme Court described as "a strangely irregular twenty-eight-sided figure" (364 U.S. at 341). The complainants, black citizens resident within the square boundaries, sought in the federal courts a declaratory judgment that the statute was unconstitutional, alleging that its "essential inevitable effect" would be "to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident."

The lower federal courts dismissed the action on the ground that they had no power to review the Alabama legislature's action. The Supreme Court unanimously reversed the judgment below, holding that, upon the facts alleged, the statute violated the Fifteenth Amendment, since upon those facts ". . . the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segragating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."

I believe that the relevance of the Gomillion case to the issue at hand here is obvious. The power of the Alabama legislature over municipal districting was recognized by the Supreme Court as having "breadth and importance" (364 U.S. at 342), just as Congressional power under Section 1 of Article III should be so recognized. The Alabama statute did not explicitly disfavor black residents of Tuskegee, but the boundaries drawn made clear its unconstitutional purpose and effect. Section 2 of S.158 does not explicitly avow an unconstitutional purpose, but such a purpose is nonetheless manifest, from both its text and its context.

To be sure, the constitutional rights involved are not the same. The Gomillion case involved the voting rights protected by the Fifteenth Amendment or, as Justice Whittaker thought (356 U.S. at 349), the equal protection clause of the Fourteenth Amendment. That clause is not irrelevant to the scrutiny of S.158, but the constitutional rights recognized in Roe v. Wade are, under the Court's opinion, based on the concept of personal liberty embodied in the due process clause. These rights the Court declared to be "fundamental," and "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (410 U.S. at 153). Certainly they are constitutionally entitled to as much protection as those involved in the Gomillion and Grosjean cases.

Plainly S.158, including Section 2, is intended to prevent if possible, and at least to obstruct, fulfillment of the rights recognized in Roe v. Wade. Indeed, the sponsors of this and similar bills have been commendably frank in acknowledging that purpose, and have no effort to mask it. I am taking the liberty of attaching to my statement the letter to me from the ranking minority member of this Subcommittee, requesting my views on the constitutionality of Section 1 of S.158, together with my reply. The Senator's letter states that the purpose of S.158 "is to overturn the effect of the Supreme Court decision in Roe v. Wade." That, of course, is not a jurisdictional but a substantive purpose, and indicates that Section 2 is not, despite its form, intended as a jurisdictional enactment.

But it is quite unnecessary to rely on such statements by the bill's sponsors, and my conclusion that Section 2 is unconstitutional is based squarely on the text of the bill itself. For it is impossible to conceive of any jurisdictional considerations to which the bill is relevant. There are, to be sure, a number of litigations involving the performance of abortions pending in the federal courts, but they constitute but an infinitesmal part of the total volume of federal court litigation. Thus the bill cannot reasonably be regarded as intended to reduce the burdens on the federal courts.

Cases involving the federal constitutionality of state laws are, to be sure, very numerous in both state and federal courts. A view could be advanced that since state laws are involved, their validity should be first passed upon in the state courts. Of course, that would throw on the Supreme Court the entire burden of ensuring uniformity among the states of the standards of constitutional validity, and I do not think such a course would commend itself as a matter of policy. But recognizing that such a decision is within the ambit of Congressional power, S.158 accomplishes this only with respect to injunction and declaratory judgment actions involving the particular rights recognized in Roe v. Wade. It cannot reasonably be contended that so singular a change is reasonably related to a general jurisdictional purpose. Nor do abortion litigations present any features that explain singling them out from other rights similarly derived from the Fifth or Fourteenth Amendments, for exclusion from the federal courts.

The conclusion is inescapable, on the face of the bill, that its only purpose and its inevitable effect are to obstruct the judicial protection of the constitutional rights recognized in Roe v. Wade. Such purpose and effect, in the absence of a compelling state interest, are unconstitutional: "It is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right secured by the Constitution [it] is presumptively unconstitutional.'" Harris v. McRae, 480 U.S. -- , 65 L.Ed. 2d 784, 801 (1980); Mobile v. Bolden, 446 U.S. 55, 76 (1980); San Antonio School District v. Rodriguez, 411 U.S. 1, 17, 31 (1973); Shapiro v. Thompson 394 U.S. 618, 634 (1969).

I should add, though it may be unnecessary, that Section 2 of S.158 also violates the principle of equal protection of the laws, which has been held to be embodied in the due process clause of the Fifth Amendment, and is therefore binding on the federal government as well as the states. Bolling v. Sharpe, 347 U.S. 492 (1954). For the jurisdictional withdrawal in Section 2 singles out pregnant women, whose rights are protected by Roe v. Wade, as a group subjected to a denial of access to the federal courts. There is no conceivable state interest which warrants subjecting them to this deprivation of access to the federal courts equal to that enjoyed by those seeking to protect comparable constitutional rights.

### 4. There is no valid precedent for the jurisdictional withdrawal attempted in Section 2 of S.158

There remains to be considered the question whether there are precedents, legislative or judicial, which might be effectively invoked to justify the jurisdictional withdrawal attempted by Section 2 of S.158. Its acknowledged purpose is not novel. The Supreme Court must, in the nature of things, deal with issues which arouse strong political, social, and religious feelings. Some of its decisions are bound to antagonize individuals and even large groups of people who believe with deep sincerity that what the Court has done is very wrong, but who also realize that the prospect of undoing its work by the method prescribed in the Constitution -- i.e., by amendment pursuant to Article V -- is remote. The device of accomplishing a nullification, complete or partial, of a Court decision by withdrawing from the courts jurisdiction to enforce it, has been used in many bills introduced in Congress on many previous occasions.

Constitutional scholars tell us that between 1953 and 1968 over sixty bills were introduced in Congress to eliminate the jurisdiction of the federal courts over a variety of particular subjects. Hart and Wechsler, The Federal Courts and the Federal System (2nd edit. 1973) 360. That is not surprising, since those years witnessed a number of Supreme Court decisions which were sharply denounced, both within and without Congress. What is perhaps surprising, in view of the heat generated, is that not one of those bills was enacted into law. Congress as a whole has exhibited a most commendable restraint in this regard, realizing no doubt that this is a dangerous game which can be played at both ends of the spectrum, and that if such devices begin to take hold as statutes, the ultimate result will not be to ensure the dominance of a particular point of view, but to alter radically the long-established relation and balance among the legislative, executive, and judicial departments.

In consequence of this enduring Congressional restraint, the statutory and judicial examples which are somewhat comparable to S.158 are very few, and there are only three which I think warrant comment.

The Norris-LaGuardia Act (1932). I deal with this statute (now 29 U.S.C. Secs. 101-115) first, not only because it is the earliest chronologically, but also because some of the language of Section 2 of S.158 appears to be derived from it.

The Norris-LaGuardia Act arose out of the belief, shared by leaders of both the Republican and Democratic parties, that there had been abuses in the issuance of injunctions in labor disputes. S. Rep. No. 163, H.R. Rep. No. 669, 72d Cong., 1st Sess.; Frankfurter and Greene, The Labor Injunction (1930) passim. Section 1 of the Act provides:

> No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary injunction be issued contrary to the public policy declared in this chapter.

It will be noted that, unlike Section 2 of S.158, the Norris-LaGuardia Act does not wholly withdraw the jurisdiction to issue the specified injunctions. Section 2 declares a public policy of freedom for workers to associate and organize for collective bargaining and other labor ends; Sections 4 and 5 specify certain conduct which is excluded from injunctive jurisdiction; Sections 7 and 9 specify certain findings which the courts must make and procedures they must follow before issuing injunctions.

None of these provisions involved infringement of constitutional rights, and Congress' power to regulate and limit the remedies (including injunctions) available to litigants in the lower federal courts (in the absence of such infringements) had never been seriously questioned. When a case arose wherein a lower federal court had issued an injunction on the basis that the case did not involve a "labor dispute" as defined in the Act, the Supreme Court, in reversing that decision, gave general approval to the Act's jurisdictional limitations: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).

But the Lauf case did not concern other provisions of the Norris-LaGuardia Act which (Section 3) declare "yellow dog contracts" (i.e. employment agreements conditioned on the employee's undertaking not to join a union) to be "contrary to the public policy of the United States" and "not . . . enforceable in any court of the United States," and (Section 4(b)) withdraw from the federal courts jurisdiction to enforce such contracts. Many years earlier the Supreme Court had invalidated, as violations of due process, both federal and state statutes outlawing "yellow dog" contracts. Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915). Thereafter the Supreme Court also held state legislation, limiting employers' rights to state court injunctions against striking employees, to be invalid under the due process and equal protection clauses. Truax v. Corrigan, 257 U.S. 312 (1921).

None of these decisions had been formally overruled at the time the Norris-LaGuardia Act was adopted, and it was certainly arguable that Sections 3 and 4(b) were unconstitutional, insofar as they rendered "yellow dog" contracts unenforceable in, and outside the jurisdiction of, the federal courts. In all probability it was such doubts that led Congress to provide for the withdrawal of injunctive jurisdiction, guided by a memorandum from (then) Professor Felix Frankfurter stressing the scope of Congressional power over federal court jurisdiction (H. Rep. No. 669, *supra* pp. 12-16); see also Frankfurter and Greene, *supra* pp. 210-20.

The constitutional validity of Sections 3 and 4(b) of the Norris-LaGuardia Act was never judicially tested, no doubt because the Act's importance was greatly diminished by passage of the National Labor Relations Act in 1936. The *Adair* and *Coppage* cases were not explicitly over-ruled until 1941. *Phelps Dodge Corporation* v. *Labor Board*, 313 U.S. 177, 187 (1941). But they were in poor constitutional health as early as 1930, when the Court unanimously upheld the Railway Labor Act of 1926, in an opinion by Chief Justice Hughes (who had dissented in the *Coppage* case) which distinguished the *Adair* and *Coppage* cases in casual and unconvincing fashion. *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 570 (1930). And of course, if those cases were no longer governing in 1932, the constitutional rights they declared had likewise withered, and the jurisdictional withdrawal in Section 4(b) of the Norris-La Guardia Act impaired no such rights.

For all these reasons, I do not believe that the Norris-La Guardia example offers any substantial support to the constitutionality of Section 2 of S.158.

*The Emergency Price Control Act of 1942*. This statute, enacted under the pressures of wartime, contained provisions narrowly channeling federal court jurisdiction to review orders and regulations of the Price Administrator, in order to secure rapid and uniform enforcement of wartime price controls. An "Emergency Court of Appeals," composed of three federal district or circuit judges, was established to hear and determine such cases, subject to review by certiorari in the Supreme Court. All other courts, both federal and state, were denied jurisdiction to pass on the validity of the Administrator's acts, with certain specified exceptions.

Whether the prohibitions running to the state courts were ever judicially reviewed, I do not know; state court obligation to entertain damage suits for violation of price ceilings was confirmed in Testa v. Katt, 330 U.S. 386 (1947). The withdrawals of jurisdiction from the federal district and circuit courts were sustained. Lockerty v. Phillips, 319 U.S. 182 (1943); Yakus v. United States, 321 U.S. 414 (1944).

The statutory feature most susceptible to constitutional challenge was the denial of the Emergency Court of any power to grant interim relief, by temporary restraining order or injunction. This provision was upheld in the Yakus case not as a general proposition but only "in the circumstances of this case," meaning the war emergency (321 U.S. at 437, 439): "If the alternatives, as Congress concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation."

There is no such emergent and compelling public interest to be invoked in support of the denial of federal injunctive relief in abortion litigation. Abortion cases, on the contrary, are of a nature that especially requires the availability of interim protection; the pregnant woman can hardly be required to comply with an anti-abortion statute while its constitutional validity is being determined.

The price control statutes and decisions, born as they were of the urgent necessities of wartime, thus offer no support to the jurisdictional withdrawal attempted by S.158.

The Portal-to-Portal Act of 1947. In decisions rendered between 1944 and 1946, the Supreme Court construed the "work week" clause of the Fair Labor Standards Act of 1938 as including underground travel time in mines. Time so spent had not theretofore been generally treated as compensable, and these decisions precipitated a flood of litigation embracing claims for back pay totalling over 5 billion dollars, including claims against the United States totalling over 1-1/2 billion dollars. Congress then enacted the Portal-to-Portal Act of 1947 (29 U.S.C. 251-62), in which Congress found that such unexpected retroactive liabilities threatened financial ruin to many employers and serious consequences to the federal Treasury. To avoid these hazards, the Act not only wiped out the liabilities, but also withdrew jurisdiction to adjudicate such claims from all federal and state courts without exception.

In the numerous litigations which ensued, it was contended that Congressional nullification of these claims destroyed vested rights in violation of the Fifth Amendment. The courts uniformly rejected this contention, but most of them took jurisdiction and decided the cases on the substantive merits, despite the attempted withdrawal of jurisdiction. Thus a distinguished panel of judges in the Court of Appeals for the Second Circuit wrote in Battaglia v. General Motors Corp., 169 F.2d 254, 257 (C.C.A.2d, 1948):

> A few of the district court decisions sustaining . . . the Portal-to-Portal Act have done so on the ground that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part. . . . We think however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law, or to take private property without just compensation [citing cases]. . . .

That decision and the passage quoted squarely support the position I am taking here today. Just as in the Portal-to-Portal Act, Section 2 has been included in S.158 for the sole purpose of blocking judicial review of Section 1 thereof. And since Section 1 seeks to achieve ends which are unconstitutional under the Fifth Amendment, as was established in Roe v. Wade, Section 2 is itself in violation of the Fifth Amendment.

I should deal with one further matter. The Portal-to-Portal Act sought to close off access to all courts, state and federal alike, while both the Norris-LaGuardia Act and Section 2 of S.158 leave access to the state courts untouched. Although the Battaglia court did not rest its decision on that circumstance, it is the view of some constitutional scholars that this difference is crucial, and that would-be litigants barred by Congress from access to the federal courts have no basis for complaint if the state courts remain open to them.

It is hard for me to take this argument seriously. The fact that a statutory withdrawal of jurisdiction is limited to the federal courts certainly does not immunize that statute from constitutional scrutiny. It cannot be seriously contended that a statute limiting federal court access to white litigants could be sustained on the ground that the suits of black litigants could be determined in the state courts.

This does not mean that continued access to the state courts may not in some circumstances be a relevant constitutional factor. If a substantial state interest is asserted as the basis for denying federal jurisdiction, and that interest must be weighed against the disadvantage to litigants, the fact that the state courts remain available may well tip the scales in favor of the withdrawal. In all three of the instances of withdrawal discussed above, such interests were credibly asserted. But no such interests are or can be credibly invoked in support of Section 2 of S.158, which shows on its face that its only purpose is to chill and obstruct the vindication of constitutional rights.

In theory, if not in practice, Congress has power to repeal the 1875 legislation which gave the federal courts general jurisdiction in cases arising under the Constitution and laws of the United States. But having conferred such general jurisdiction, Congress must have a constitutional basis for making exceptions to it, and the fact that the state courts may be available is but one factor for consideration. With regard to Section 2 of S.158, I believe it is of no weight, since no valid purpose of the withdrawal is invoked.

## Conclusion

For all the reasons given, it is my opinion that Section 2 of S. 158, or any comparable bills that would selectively withdraw federal court jurisdiction over particular constitutional claims, if enacted, would be unconstitutional. I thank the Subcommittee for affording me this opportunity to present my views.

United States Senate
WASHINGTON, D.C. 20510

April 29, 1981

Professor Telford Taylor
Department of Law
Columbia University
Broadway & West 116th St.
New York, New York 10027

Dear Professor Taylor:

I am currently serving as the ranking minority member of the United States Senate Judiciary Committee Subcommittee on Separation of Powers. On April 23 and 24, the Subcommittee is beginning a series of hearings on S.158. This legislation is designed to define human personhood as beginning at conception. The purpose of the legislation is to overturn the effect of the Supreme Court decision in Roe v. Wade. I am enclosing a copy of the bill for your review.

I am writing to you in your capacity as a leading expert on American constitutional law. I am interested in your assessment of whether or not the Congress has the authority under the Constitution and particularly under Section 5 of the 14th Amendment to enact Section 1 of S.158. Does the Congress have the authority to define legal/constitutional personhood in the face of the Supreme Court decisions on abortion? For legal analysis by the sponsor of the bill, see Volume 127 Con. Rec. S.288-S.294 (Daily Ed. January 19, 1981).

The Subcommittee will be considering these matters in the near future and so a timely response would be most helpful.

I appreciate your assistance in this matter and look forward to hearing from you as soon as possible.

With best personal regards, I am

Sincerely,

Max Baucus

Enclosure

May 7, 1981

Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This will acknowledge your letter of April 29, 1981, requesting my opinion on the constitutionality of bills such as S. 158 and H.R. 900, which undertake to define "person" as used in the Fourteenth Amendment to the Constitution as including the human fetus from the moment of conception. It is understood that the purpose of these bills is to override the Supreme Court's rulings in Roe v. Wade, 410 U.S. 113 (1973) and subsequent decisions based on the principles of that case. Since those decisions are based on the Constitution itself, it appears that the purpose of these bills is to bring about a change in the scope and effect of the relevant Constitutional provisions by statutory means, rather than by amendment of the Constitution in accordance with the procedures prescribed in Article V.

The bills in question rely explicitly on the power of Congress under Section 5 of the Fourteenth Amendment as the constitutional basis of their provisions. The scope of this power, during the last fifteen years, has been the subject of at least four significant Supreme Court decisions. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); Rome v. United States, 446 U.S. 156 (1980); see also Fullilove v. Klutznick, 448 U.S. ___ (1980). In all these cases except the first, the Court was divided in opinion on the governing principles, and professional comment on the problem has reflected its controversial nature.

Despite this division of opinion, I believe it to be clear that the bills in question are unconstitutional. The majority opinion in the Morgan case goes further than any other in giving scope to Congressional power under Section 5 of the Fourteenth Amendment, but in that opinion it was categorically stated that Section 5 gives Congress no power "to restrict, abrogate, or dilute" constitutional guarantees. Katzenbach v. Morgan, 384 U.S. at 651 n.10. There can be no doubt that the purpose and purport of the bills in question is to "restrict, abrogate, or dilute" the constitutional rights of pregnant women as established in Roe v. Wade.

As for the members of the Court who do not share the expansive views of Congressional power under Section 5 articulated by the majority in the Morgan case, it is my belief that, regardless of their agreement or disagreement with Roe v. Wade, they would conclude that the constitutional principles it established cannot be nullified by statutory action.

For the foregoing reasons, stated above in summary form, it is my opinion that the bills you have called to my attention are unconstitutional.

Sincerely yours,

Telford Taylor
Nash Professor of Law, Emer.

TT:el

## QUESTIONS SUBMITTED BY SENATOR LEAHY TO TELFORD TAYLOR

The scope of these hearings concerns Congress's authority to restrict the jurisdiction of federal courts under Article III of the Constitution. Article III says in part:

> Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .
>
> Section 2. . . . In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to law and fact, with such Exceptions, and under such Regulations as the Congress shall make. (emphasis added).

The questions to be raised in these hearings cover the Constitutional and policy issues underlying the interpretation of the language referred to above.

One of the witnesses scheduled to appear tomorrow, Bill Van Alstyne, a law professor at Duke, has, in his testimony, succinctly stated the four critical questions which must be addressed:

> 1. What may be within the power of Congress in respect to making "such Exceptions" as it wishes to make to the appellate jurisdiction of the Supreme Court?
>
> 2. What is quite clearly not within that power?
>
> 3. How may other clauses in the Constitution separately limit Congress in respect to its authority to make such exceptions as it might wish?
>
> 4. What considerations of policy and of statescraft should inform Congress respecting the wisdom and practicality of limiting the Supreme Court's appellate jurisdiction?

Testimony from noted Constitutional scholars will focus on these issues today and tomorrow and in hearings to be scheduled in late June. The bills before the Senate which actually restrict jurisdiction are by and large in Senator East's subcommittee and their individual provisions will not be the major focus of these hearings.

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW

435 West 116th Street

June 23, 1981

Hon. Orrin G. Hatch, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

This is in reply to your letter of June 5, 1981, and the questions enclosed therewith. I am replying to them below in the order of their statement in the enclosure.

No. 1. If the phrase "may be within" is intended to embrace areas wherein "respectable argument" might be advanced in support of Congressional power, I would answer that everything may be within the power of Congress except what is covered in the second question.

No. 2. Clearly not within the power are "Exceptions" or "Regulations" which violate other provisions of the Constitution.

No. 3. Such provisions are numerous, and no list could be offered with full assurance that it is complete. In my opinion, statutes making "Exceptions" or "Regulations" are subject to the same range of constitutional limitations as other statutes. Obviously, the list would include the limitations expressed in Article I Sections 9 and 10, Article III, and Article IV of the original Constitution, and in Amendments I to X, XIII to XV, XIX, XXIV, and XXVI. But that is by no means all. In United States v. Klein, 13 Wall. 128 (1872), a statutory exception to the jurisdiction of the Supreme Court was held unconstitutional as in violation of the President's pardoning power in Article II Section 2. While it is difficult to conceive of cases in which the "machinery" provisions of Article I or Amendments XII, XVII, XX, XXII, or XXIII could be invoked to invalidate an "Exception" to or "regulation" of Court jurisdiction, I would be unwilling to certify that such a case could not possibly arise.

No. 4. Just as the dominant purpose of the Constitution as a whole was to establish a harmonious and efficient relation between the states and the nation, so the dominant purpose of Article III, including the exceptions and regulations clause, was to establish a harmonious and efficient relation between the state and federal judiciaries. Once the Congress had exercised its constitutional option by establishing inferior federal courts, there additionally arose problems of organization and efficiency within the federal judicial system, some of which are only remotely related to considerations of federalism. These are the major "considerations of policy and statescraft" to which Congressional wisdom should be devoted in exercising the powers under the exceptions and regulations clause.

I know of nothing in constitutional history which would support the idea that Congressional power over court jurisdiction was intended as a means by which Congress may foreclose or nullify Supreme Court decisions construing and enforcing constitutional limitations. So applied, the power over jurisdiction would leave the legislative branch bound only by its own interpretation of its own powers, and would move this nation a long way towards the English system of Parliamentary supremacy. There may be much to be said for such a system, but if so drastic and revolutionary a change is to be made, it should not be the result of a majority vote in the Congress triggered by strong feelings on particular issues, but rather by the specified and established procedures of constitutional amendment.

Respectfully yours,

Telford Taylor

Telford Taylor

Senator HATCH. I think this has been a particularly interesting hearing, especially for those of us who are tremendously concerned about these issues that surround the exceptions clause of the Constitution.

We appreciate the efforts that have been put forth by all four witnesses today.

We may hear alternative points of view tomorrow, but it has been a very interesting day to me. We thank all of you for coming.

With that, we will recess the hearing.

[Whereupon, at 11:30 a.m., the hearing recessed, to reconvene the following day at 9:30 a.m.]

# CONSTITUTIONAL RESTRAINTS UPON THE JUDICIARY

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THURSDAY, MAY 21, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:37 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Staff present: Randall Rader, general counsel; Stephen Markman, general counsel; Peter Ormsby, professional staff assistant; Claire Greif, clerk; and Kim Beal, assistant clerk.

## OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The hearing will come to order.

This is the second day of hearings on the subject of constitutional restraints on the judiciary—specifically, the authority conferred upon Congress by article III, section 2, of the Constitution, to make exceptions in Federal court appellate jurisdiction.

Yesterday the subcommittee was privileged to hear from several distinguished witnesses: Professor Ratner from the University of Southern California; Professor Alexander from the University of Santa Clara; Professor Bator from Harvard; and Professor Taylor from Columbia.

Professors Ratner and Taylor argued that Congress may not make exceptions that might abridge the Supreme Court's essential role in the constitutional plan. Professor Bator discussed the role of the States in guaranteeing constitutional rights. Professor Alexander urged the subcommittee to make sure any use of the exceptions clause does not make it more difficult for an individual to secure his rights under the Constitution.

The subcommittee looks forward to continuing this important discussion on the role of the Federal judiciary and Congress function to participate in defining that role.

Article III of the Constitution outlines the form and authority of the judicial branch. Section 2 of that Article lists the original jurisdiction of the Supreme Court and then proceeds as follows:

> In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

On its face, this language appears to grant the legislative branch authority to regulate which cases the Supreme Court can hear on appeal from State courts.

As the subcommittee explores the intent of the framers in making this clause a part of the language that established the Federal judiciary, we will necessarily review some of the historical record associated with the drafting of our nation's foundational document.

For instance, Alexander Hamilton tried to quell apprehensions about the judiciary with the following language:

> If some partial inconveniences should appear to be connected with the incorporation of any of the powers of the Federal judiciary into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.

That is found in the Federalist, No. 81.

The subcommittee must also examine the statements of the Supreme Court itself relative to the power of Congress to make exceptions in its appellate jurisdiction. This will entail some understanding of the Supreme Court's reasoning in the ex parte *McCardle* case.

In that case, the court dismissed the habeas corpus appeal of a southern editor challenging the constitutionality of Congress post-Civil War reconstruction program because its appellate jurisdiction had been withdrawn by statute.

At length, the subcommittee must also inquire into the limits on this constitutional authority. The Constitution itself contains no express limits on this power to set the parameters of Federal jurisdiction to hear appeals. Or, stated otherwise, to set the parameters on leaving jurisdiction to the State courts, bound as they are by the Constitution. Yet the Constitution must be read as a unified document with some phrases implying limitations on others.

At this time, several bills are before the Senate that would employ the exceptions power. In most instances, these proposals each desire to halt the nationalization of important legal disputes.

While the subcommittee does not intend to devote much energy in this hearing to consideration of the various applications of the exceptions power now pending, we must nonetheless recognize the wider implications of our inquiry.

The most important implication, however, is the clarification of congressional responsibility to monitor the Federal judiciary's use of appellate jurisdiction. This inquiry will certainly influence the future of relations between the judiciary and the legislature.

Today we have four excellent authorities on these particular issues surrounding the exceptions clause.

We would like all four to come up as a panel.

I understand Mr. Cutler and Professor Rice are not here yet.

The first witness before the subcommittee today will be Prof. Martin Redish from Northwestern University School of Law.

Professor Redish has very vigorously examined the issues presented by our hearing and has published writings. In fact, his article, "Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis," is regarded as one of the leading sources on this question.

Before we hear from Professor Redish, or any other witness, I would like to remind our witnesses that their entire written statements will be included in the record at the completion of the oral presentations.

We would like you to limit your oral remarks to approximately 10 minutes if you can. We are pressured here, and I have to be at two other meetings. I would like to hear as much as I can orally, and then maybe ask some questions.

I have a meeting with Senator Baker at 10:30. If I have to leave, I am going to ask staff to ask the questions.

We will keep the record open to submit questions in writing by any of our colleagues on this subcommittee.

We are also happy to have Prof. William Van Alstyne here. He is from Duke University.

Perhaps it is introduction enough to simply note that Professor Van Alstyne presented some of the most persuasive testimony the subcommittee received on the affirmative action question a few weeks ago, and that he will present testimony before still another subcommittee this afternoon.

Clearly, your opinion, Professor Van Alstyne, is in demand—certainly by this subcommittee.

Today, however, we are anxious to draw upon the expertise you have exhibited by publishing several of the most important writings on the subject of the exceptions clause.

We are delighted to have both of you here today. We will start with you, Professor Redish and then go to Professor Van Alstyne, and then we will have some questions for you.

## STATEMENT OF MARTIN H. REDISH, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Dr. Redish. Thank you, Mr. Chairman.

Congress general power to regulate the jurisdiction of the Federal courts is widely accepted. However, the outer limits of this congressional power, if any, remain the subject of vigorous academic debate.

The issue has remained largely an academic one, because congressional attempts to regulate Federal jurisdiction in anything more than the most uncontroversial manner have been relatively rare over the Nation's history.

Since Congress is presently giving serious consideration to a wide range of measures, designed to curb the jurisdiction of the Federal courts in general and the appellate jurisdiction of the Supreme Court in particular, it is possible that these ultimate issues will have to be faced, both by Congress and the courts.

My ultimate conclusion is that if Congress truly desires, it can do almost anything it wants to the appellate jurisdiction of the Supreme Court.

Of course, whether as a matter of social policy Congress should exercise all the authority the Constitution gives it is an entirely different matter.

I speak at the moment only to the issue surrounding the limits of the constitutional power.

Before explaining why I believe Congress possesses such broad ultimate power, I should emphasize what I believe Congress cannot constitutionally do.

Initially, there can be little doubt that Congress cannot employ its authority over Federal jurisdiction to discriminate in an invidious manner. Congress could clearly not, for example, prohibit only Jews or blacks from having access to the Federal courts.

The fifth amendment's due process clause as construed by the Supreme Court requires equal protection of the law, and the amendment supersedes anything to the contrary contained in the body of the Constitution.

Second, while Congress may shut off the jurisdiction of the Federal courts, it may not require that those courts act in an unconstitutional manner, such as using those courts for purposes of criminal enforcement, while not allowing them to consider the constitutional validity of the law they are enforcing.

The implicit constitutional doctrine of separation of powers prohibits such a result.

Finally, I firmly believe that Congress cannot deny the availability of at least some forum, independent of Congress, to act as the final arbiter of whether congressional legislation violates constitutional rights. Due process requires no less.

Otherwise, the very institution claimed to be threatening constitutional rights would effectively sit in final judgment on whether or not those rights were violated.

Such an arrangement would mean that, as a practical matter, the rights did not exist.

As will be seen from the following discussion, however, that forum need not be the U.S. Supreme Court.

The relevant provision of article III delimiting the scope of Congress power to regulate the Supreme Court's appellate jurisdiction is the so-called exceptions clause. It provides that the "Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

On its face, the clause appears to recognize virtually no limit on Congress power. The little Supreme Court precedent that is applicable is thought by many to be consistent with this interpretation, as illustrated by the 1868 decision in *Ex Parte McCardle*.

There the Supreme Court refused to decide an appeal from a lower court's denial of a writ of habeas corpus which challenged the constitutionality of the Federal Military Reconstruction Act.

After the case had been argued in the Supreme Court, Congress repealed the statute enacted 1 year earlier, allowing the Supreme Court to review habeas decisions in the manner used by Mr. McCardle. The court then dismissed the case for want of jurisdiction.

Read for all it might be worth, *McCardle* seems to give Congress broad power to preclude Supreme Court appellate review. The language of *McCardle* seems to give Congress plenary power over the court's appellate jurisdiction, allowing Congress to prevent review of all or part of the cases allocated to the court's jurisdiction.

*McCardle* poses a significant problem to those who argue that the exceptions clause itself limits Congress power to restrict the Supreme Court's appellate jurisdiction.

In accepting Congress withdrawal of a case already argued in the Supreme Court, the court mentioned no limitation in article III, and *McCardle* seems to be a most intrusive restriction on the court's jurisdiction.

Those who find limitations in the exceptions clause itself, such as Prof. Henry Hart, urge that *McCardle* should not be read for all it might be worth. Further, although *McCardle* and other cases have used broad language in describing Congress power, such language is not dispositive because the court has not, in fact, been faced with a significant restriction on its appellate jurisdiction.

For example, all that Congress did in *McCardle* was to eliminate one route that McCardle could take to the Supreme Court. Even after the repealer, McCardle himself could have taken his case to the Supreme Court by filing a writ of habeas in the Supreme Court.

Thus, the argument runs that the repealer did not accept a class of cases from the court's appellate jurisdiction; it merely rescinded a statutory right of appeal—one of the two procedures through which the court could assert appellate jurisdiction.

The court's broad language in *McCardle* is, according to this view, unfortunate but certainly not conclusive of Congress power.

The Supreme Court precedent on the question, then, is probably not dispositive.

Commentators have suggested several bases for limiting Congress power in this area, some of which are based on the language of the exceptions clause itself while others derive from other provisions of the Constitution.

Perhaps the leading theory based on the clause itself is the so-called essential functions thesis, which postulates that Congress power does not extend to preventing the court from performing its essential role, or essential functions, in the constitutional scheme.

These functions are said to be to resolve conflicting interpretations of Federal law and to maintain the supremacy of that law when it conflicts with State law or is challenged by State authority.

Under this view, any attempt by Congress to preclude appellate review in every case involving a particular subject would be unconstitutional.

The major difficulty with this theory is that it finds no basis in either the language or history of the Constitution. Certainly, the explicit wording of the provision says nothing about it, and the history of the clause is not of significant assistance to those urging the essential functions thesis.

Therefore, as attractive as the theory may seem as a matter of policy, it does not appear to find support in the Constitution itself.

A linguistic argument might be fashioned that the exceptions clause cannot be construed to allow Congress to gut the court's appellate jurisdiction in a wholesale manner, since the terms exception implies the so-called rule must be to the contrary of the exception.

Even if such an argument were accepted—and if it were, there would seem to be no easily definable stopping point—it is not likely that the enactment of laws limiting the Supreme Court's appellate jurisdiction in cases concerning abortion, busing, or prisons would cause difficulties in that manner.

On balance, therefore, I can see little constitutional stopping point to Congress power to regulate the Supreme Court's appellate jurisdiction.

I must emphasize that purely as a matter of social policy, I believe any serious tampering with the court's appellate jurisdiction could cause grave practical problems to the independence of the judiciary and to the delicate system of checks and balances which has evolved over the Nation's history.

In past years, previous Congresses were also disturbed with many substantive decisions of the Supreme Court. They, too, considered legislation to curb the court's jurisdiction. With rare exception, those Congresses declined to take such drastic action.

I strongly urge you to exercise similar restraint, both for the good of the Nation and for the rule of law.

Thank you.

[The prepared statement of Dr. Redish follows:]

# PREPARED STATEMENT OF PROF. MARTIN H. REDISH

Congress' general power to regulate the jurisdiction of the federal courts is widely accepted. However, the outer limits of this congressional power, if any, remain the subject of vigorous academic debate. The issue has remained largely an academic one, because congressional attempts to regulate federal jurisdiction in anything more than the most uncontroversial manner have been relatively rare over the nation's history. Since Congress is presently giving serious consideration to a wide range of measures designed to curb the jurisdiction of the federal courts, it is possible that these ultimate issues will have to be faced, both by Congress and the courts.

My ultimate conclusion is that if Congress truly desires, it can do almost anything it wants to the jurisdiction of the lower federal courts or to the appellate jurisdiction of the Supreme Court. Of course, whether as a matter of social policy Congress should exercise all the authority the Constitution gives it is an entirely different matter. I speak at the moment only to the issues surrounding the limits of the constitutional power.

Before explaining why I believe Congress possesses such broad ultimate power, I should emphasize what I believe Congress cannot constitutionally do. Initially, there can be little doubt that Congress cannot employ its authority over federal jurisdiction to discriminate in an invidious manner. Congress could clearly not, for example, prohibit only Jews or Blacks from having access to the federal courts. The Fifth Amendment's Due Process Clause, as construed by the Supreme Court, requires equal protection of the law, and the Amendment supersedes anything to the contrary contained in the body of the Constitution.

Secondly, while Congress may shut off the jurisdiction of the federal courts, it may not require that those courts act in an unconstitutional manner, such as using those courts for purposes of criminal enforcement while not allowing them to consider the constitutional validity of the law they are enforcing. The implicit constitutional doctrine of separation of powers prohibits such a result, and Supreme Court decisions such as United States v. Klein 80 U.S. (13 Wall.) 128 (1871), and Yakus v. United States, 321 U.S. 414 (1944), make this conclusion clear.

Finally, I firmly believe that Congress cannot deny the availability of at least some forum independent of Congress to act as the final arbiter of whether congressional legislation violates constitutional rights. Due process requires no less; otherwise, the very institution claimed to be threatening constitutional rights would effectively sit in final judgment on whether or not those rights were violated. Such an arrangement would mean that, as a practical matter, the rights did not exist. As will be seen from the following discussion, however, that forum need not be either a lower federal court whose judges sit with the tenure and salary protections of Article III of the Constitution, or the United States Supreme Court. With these points as background, it is now appropriate to turn to the questions of what Congress can do to the jurisdiction of federal courts, and why.

## Congressional Power to Control Lower Federal Court Jurisdiction

Though from the nation's beginning Congress did, in the Judiciary Act of 1789, establsih lower federal courts, the history and language of Article III imply that the creation of inferior tribunals was not required, but rather was vested in the discretion of Congress. This conclusion grows out of the history surrounding the "Great Compromise," also known as the "Madisonian Compromise," because of Madison's major role in its development.

It has been generally assumed that since Congress need not have created lower federal courts in the first place, it can abolish them once they have been created. It was also assumed that since Congress could abolish the lower federal courts, logically it could "abolish" them to a lesser extent by allowing them to exist but at the same time limiting their jurisdiction. Thus, although Congress could vest in the lower federal courts full power to hear all cases to which the federal judicial power extends under Article III, section 2 of the Constitution, it is not required to do so. In other words the "greater" power to abolish the lower courts logically includes the "lesser" power to limit the kinds or amount of cases they can hear.

However, not everyone agrees that the language of Article III was intended to--or does--provide Congress with discretion to refuse to create lower federal courts. And, or course, if Congress were required to create lower federal courts, the congressional power to limit lower federal court jurisdiction, premised as it is on the assumed congressional power to abolish those courts completely, would not be as broad as this logic suggests. Since the nation's beginnings, several commentators have suggested various theories as to why Congress may not abolish the lower federal courts. See J. Story, Commentaries on the Constitution §§1584-90 (1833); Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L. J. 498 (1974). Ultimately, however, none of these theories can be reconciled with either the language or history of the Constitution, and none has been accepted by the courts.

But while none of these theories effectively undermines either the language or history of Article III's broad congressional power to regulate the jurisdiction of the lower federal courts, there is one potentially significant complication. In an 1871 decision known as Tarble's Case, 80 U.S. (13 Wall.) 397 (1871), the Supreme Court held that state courts lack authority to issue writs of habeas corpus to federal officers. Many years earlier, the Court had held that state courts do not have the power to issue writs of mandamus to federal officers, and, although the Supreme Court has never decided the question, the majority of lower court decisions agree that state courts lack authority to enjoin federal officers. A number of modern academic commentators have seriously questioned the consistency of this line of cases with the apparent assumptions of the Constitution's framers about the fungibility of state and federal courts. However, no one questions that Tarble's Case and its progeny are still good law, and I believe the decisions accurately reflect significant alterations over time in the role played by state courts in the federal system. Because of their general lack of familiarity with federal law and possible hostility to federal authority, state courts might well cause serious disruption to ongoing federal programs by directly controlling the actions of federal agents. Therefore if state courts are to be allowed to exercise such power, it should come only after Congress has expressly concluded that they should do so. Hence unless and until Congress explicitly opens the state courts, the rule of Tarble's Case that state courts lack authority to control directly the actions of federal officers should stand.

In light of this background, the question arises, what happens when Congress has closed off the federal courts to suits to directly control federal officers for the purpose of enforcing constitional rights? I believe that if the federal courts have been closed, and the state courts remain closed by the bar of Tarble's Case, the Fifth Amendment right to an independent forum for the adjudication of constitutional rights will have been violated. In such an event, the congressional limitation of federal jurisdiction would be held unconstitutional.

Of course, under this analysis Congress could avoid this constitutional difficulty simply by explicitly opening the state courts in the same legislation in which it closes the federal courts. It might therefore be suggested that Tarble's Case, even given its broadest reading, does not limit Congressional authority in any meaningful way. In one sense, of course, this is true. However, by effectively requiring that Congress explicitly open the state courts when it closes the federal courts, this analysis forces Congress to recognize, first, that some independent forum must be open for constitutional review, and second, that if the federal courts are closed that forum must be the state courts. At the very least, then, this analysis will have the beneficial effect of assuring that Congress has recognized all of the implications of its actions.

I should emphasize that certain commentators do not accept this analysis. They believe that if the federal courts have been closed, the rule of Tarble's Case automatically falls, thus opening the state courts even without congressional action. However, this result is by no means clear from the Supreme Court's decisions, and the few lower court opinions considering the issue have tended to agree with my suggested analysis. More importantly, I should note that my analysis has no relevance whatever except in cases in which the relief sought is direct control of federal officers. Thus, for example, if Congress wishes to close off lower federal court review of school integration, abortion, or the operation of state prisons, it has constitutional authority to do so without explicitly opening the state courts; they are presumably open, and, in our constitutional scheme, represent a technically adequate forum for the ultimate protection of constitutional rights.

## Congressional Power to Control The Supreme Court's Appellate Jurisdiction

The relevant provision of Article III delimiting the scope of Congress' power to regulate the Supreme Court's appellate jurisdiction is the so-called "Exceptions" Clause, which provides that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." On its face the clause appears to recognize virtually no limit on Congress' power. The little Supreme Court precedent that is applicable is thought by many to be consistent with this interpretation, as illustrated by the 1868 decision in Ex Parte McCardle, 74 U.S. (7 Wall). 506 (1868). There the Supreme Court refused to decide an appeal from a lower court's denial of a writ of habeas corpus which challenged the constitutionality of the federal Military Reconstruction Act. After the case had been argued in the Supreme Court, Congress repealed the statute, enacted one year earlier, allowing the Supreme Court to review habeas decision in the manner used by Mr. McCardle. The Court then dismissed the case for want of jurisdiction.

Read "for all it might be worth," McCardle seems to give Congress broad power to preclude Supreme Court appellate review. The language of McCardle seems to give Congress plenary power over the Court's appellate jurisdiction, allowing Congress to prevent review of all or part of the cases allocated to the Court's appellate jurisdiction.

Ex parte McCardle poses a seemingly significant problem to those who argue that the "Exceptions" Clause itself limits Congress' power to restrict the Supreme Court's appellate jurisdiction. In accepting Congress' withdrawal of a case already argued in the Supreme Court, the Court mentioned no limitation in Article III, and McCardle seems to be a most intrusive restriction on the Court's jurisdiction. But those who find limitations in the "Exceptions" Clause itself, such as Professor Henry Hart, urge that McCardle should not be "read for all it might be worth," and further, that although McCardle and other cases have used broad language in describing Congress' power, such language is not dispositive because the Court has not in fact been faced with a significant restriction on its appellate jurisdiction. For example, all that Congress did in McCardle was to eliminate one route that McCardle could take to the Supreme Court. Even after the repealer, McCardle himself could have taken his case to the Supreme Court by filing a writ of habeas corpus in the Supreme Court. Thus, the argument runs, the repealer did not "except" a class of cases from the Court's appellate jurisdiction, it merely rescinded a statutory right of appeal, one of the two procedures through which the Court could assert appellate jurisdiction. The Court's broad language in McCardle is, according to this view, unfortunate but certainly not conclusive of Congress' power to preclude totally appeallate review in one of the classes of cases within the Court's appellate jurisdiction. This argument is supported by the Court's action later that year in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868), where the Court unanimously upheld its jurisdiction to consider a case filed under the alternative method for obtaining habeas corpus relief. Supreme Court precedent on the question, then, is probably not dispositive.

Commentators have suggested several bases for limiting Congress' power in this area, some of which are based on the language of the "Exceptions" Clause itself while others derive from other provisions of the Constitution. Perhaps the leading theory based on the clause itself is the "essential functions" thesis, which postulates that Congress' power does not extend to preventing the Court from performing its "essential role" or "essential functions" in the constitutional scheme. These functions are said to be to resolve conflicting interpretations of federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority. Under this view, any attempt by Congress to preclude appellate review in every case involving a particular subject would be unconstitutional. Although there is no significant judicial authority to support this view, even those who question its validity seem to admit that Congress has not enacted legislation which would test this theory. None of the cases in which the Court has approved Congressional restriction of its jurisdiction has involved what would be termed an "essential function" of the Court.

The major difficulty with the "essential functions" theory, however, is that it finds no basis in either the language or history of the Constitution. Certainly the explicit wording of the provision says nothing about it, and the history of the "Exceptions" Clause is not of significant assistance to those urging the "essential functions" thesis. Therefore as attractive as the theory may seem as a matter of policy, it does not appear to find support in the Constitution. To turn the words of Professor Hart, one of the thesis' leading advocates, against him, "[w]hose Constitution are you talking about--Utopia's or ours?"

Another limiting theory derived from the "Exceptions" Clause itself which may have more of an arguable basis in both constitutional language and history is the postulate that Congress' power is limited to regulating Supreme Court review of factual determinations. Historical support for this theory derives from the concern evidenced by the Framers with the danger of Supreme Court interference with the fact-finding functions of the jury. But while most, if not all, of those who have studied the relevant historical materials agree that concern over the review of facts influenced the adoption of the "Exceptions" Clause, there is disagreement as to whether this was the sole concern. For there are relevant statements indicating the desirability of a broader scope for the clause. Moreover, to construe the language of the Constitution to reach the conclusion that the clause modifies only the word "fact" requires a most tortured, and probably impermissible, grammatical construction. Finally, the greatest obstacle to this very limited view of the "Exceptions" Clause is the appellate jurisdiction authorized by the Judiciary Act of 1789, passed shortly after ratification. That law limited the Court's appellate jurisdiction to a far greater extent than the "review-or-questions-of-fact" view would allow. For example, diversity cases involving amounts less than $2000 were excluded from the Court's appellate jurisdiction.

A linguistic argument might be fashioned that the "Exceptions" Clause cannot be construed to allow Congress to gut the Court's appellate jurisdiction in a wholesale manner, since the term "exceptions" implies that the so-called "rule" must be to the contrary of the "exceptions." But even if such an argument were accepted -- and if it were, there would seem to be no easily definable stopping point -- it is not likely that the enactment of laws limiting the Supreme Court's appellate jurisdiction in cases concerning abortion, busing, or prisons would cause difficulties in that manner.

Some commentators have urged that other provisions of the Constitution may serve to limit Congress' authority under the "Exceptions" Clause. See, for example, Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Ariz. L. Rev. 229 (1973). While, as previously noted, I agree that this is the case for both equal protection and separation of powers, I cannot find in the Due Process Clause a basic right to Supreme Court review, even when constitutional rights are asserted. This is because the Supreme Court has made clear that there is no due process right to any form of appellate review, and as long as some independent forum -- whether state or lower federal courts -- is available to review the constitutionality of federal legislation, the due process right is technically satisfied.

On balance, therefore, I can see little constitutional stopping point to Congress' power to regulate the Supreme Court's appellate jurisdiction (with the clear exceptions of the limits imposed by equal protection and separation of powers). But I must emphasize that, purely as a matter of social policy, I believe any serious tampering with the Court's appellate jurisdiction could cause grave practical problems to the independence of the judiciary and to the delicate system of checks and balances which has evolved over the nation's history.

In past years, previous Congresses were also disturbed with many substantive decisions of the Supreme Court. They, too, considered legislation to curb the Court's jurisdiction. But, with rare exception, those Congresses declined to take such drastic action. I strongly urge you to exercise similar restraint, both for the good of the nation and for the rule of law. It is true that even if the Supreme Court's appellate jurisdiction is curtailed there will presumably remain open some independent forum to adjudicate constitutionality. However, two harmful consequences will still result from such congressional action. First, the Supreme Court may well be sufficiently intimidated that it will decline to perform its review functions in other areas with its traditional independence, and second, without the unifying force of the Supreme Court, important constitutional questions will be left for ultimate determination to numerous state and lower federal courts. This will undoubtedly lead to conflicting constitutional decisions and destruction of the nationally pervasive force that constitutional rights should possess. I therefore do not understand exactly why the Constitution's Framers chose to potentially undermine the unifying power of the Supreme Court by the adoption of the "Exceptions" Clause. I certainly would not have done so in their position. But while the Framers may have made this unfortunate mistake in establishing a constitutional system of checks and balances, I only hope that today Congress does not make an even greater mistake, by exercising this troubling constitutional authority given it by the Framers.

Senator HATCH. Thank you.

Professor Van Alstyne?

## STATEMENT OF WILLIAM VAN ALSTYNE, PROFESSOR OF LAW, DUKE UNIVERSITY

Dr. VAN ALSTYNE. Thank you, Mr. Chairman.

It is very good to see you again. I appreciate very much being invited.

Senator HATCH. We are happy to have you here.

Dr. VAN ALSTYNE. The statement I have submitted in advance to the committee embarrasses me a little. It is the longest single written piece of testimony I have ever presumed to impose upon a committee.

Senator HATCH. That is very uncharacteristic of you. [Laughter.]

Dr. VAN ALSTYNE. By way of introduction, I simply want to offer an explanatory apology.

Senator HATCH. Normally, Professor Redish and Professor Van Alstyne can say a great deal in very few words.

Dr. VAN ALSTYNE. I will try to live up to that today, Mr. Chairman.

This is a complicated subject, because it is very difficult to deal with the scope of the exceptions clause to the appellate jurisdiction in the Supreme Court without then trying to worry about, and at the same time take into account, what then happens to those cases which the Court might not hear, depending upon the extent to which Congress truly wants to keep these things from being adjudicated in one area or another.

It tends then to travel into the extent that Congress may also reach the jurisdiction of the lower Federal courts. Beyond that, the extent to which Congress may be able to keep the same cases even from being heard and finally adjudicated in the State courts.

It is further complicated because, of course, the powers of Congress do not merely have to be examined in terms of how broad they are—like the power to regulate the commerce among the several States.

Even after one may conclude by looking at that question that the power is very broad, then as a practical matter, one also has to worry about the impact of other clauses that limit all that Congress may do.

To choose an example, so far as I am aware, virtually every professional in the field agrees that the power of Congress to regulate commerce among the several States, in the first instance, is truly plenary. It does not know any boundaries.

As long as the act of Congress is one which is directed to commerce among the several States, even though you and I might mutually agree that the particular act, far from enhancing commerce destroys it or far from being highly desirable in what it tends to promote, in point of fact, frustrates it and throttles that commerce, everybody agrees that the power of commerce is very broad.

Essentially, Mr. Chairman, my position is quite similar, even as Mr. Redish has outlined his position to be, on the exceptions clause.

The clause does not know any interior restrictions. The emphasis is appropriately on the adjective "such." That is to say, such exceptions as Congress shall make.

It does not, as some few clauses do, build into it explicit limitations directed to appropriate uses to which it may be put.

Like the commerce power, it may be put to promiscuous and undesirable uses, but the power is there to make those damaging uses.

### THE IMPACT OF OTHER CLAUSES

Having said that much by way of an emphatic résumé of a lot of heavy printed testimony, however, all of these powers of Congress—however broad and breathtaking they may be in the first instance—of course, are also policed from the outside.

They are policed by fragments of the Bill of Rights, such that even if we had an act of Congress that dealt with a regulation of interstate commerce, for instance, if the particular act dealt with identifiable commercial firms or identifiable persons and could correctly be seen as punitive of those firms or punishing of those persons, then even though it might very well be an act of Congress, valid insofar as it regulates commerce, it may also be invalid as a bill of attainder because there is a specific restriction on "punishing" legislation adopted by Congress.

You could have an act of Congress that is valid under the commerce clause that tends to forbid the shipment of newspapers across State lines. I do not doubt that as an act of Congress it is authorized under the commerce power. However, I choose the example very deliberately so that we might at once recognize that, assuming it is valid under the commerce clause, almost certainly it is simultaneously invalid because of the first amendment. The first amendment prohibits Congress from making any law, including an otherwise valid law regulating commerce among the several States, which abridges the freedom of the press.

It would almost surely be applied by the Supreme Court to say that à regulation of commerce which simply forbids the shipment of all newspapers across State lines, may be authorized under the commerce power but because of the subject matter when Congress prohibits the shipment of the newspapers, it is also an act which abridges the freedom of the press and, therefore, is invalid under that clause.

All of that is by way of introductory apology.

You really have more than one kind of problem. The original problem is that to which my colleague has directed his attention and with which I am in substantial accord. I can find no sound historical, textual, or logical basis to carve out each individual's favored notion as to what constitutes a so-called essential function for the Supreme Court.

Having said that and having tried to deliver as much testament on that subject as I can professionally muster, there are still a lot of very vexing questions that arise because of the impact of clauses lying outside article III and outside the exceptions clause.

It is not possible in these hearings to show in what way each of those external limitations on the power might operate. We would have to focus on a particular bill, a fragment of which will be before the subcommittee this afternoon—the abortion proposal—which has one subsection about which I have serious reservations—not under the exceptions clause but because of certain Bill of Rights restrictions on the exceptions power.

### THE POSSIBLE RELEVANCE OF HABEAS CORPUS

There are some other problems. There is a clause that very few scholars have researched in this area. One may, in fact, carve out a tiny band of fixed Supreme Court jurisdictions.

In a peculiar line of cases, it is that clause in the Constitution which says that the privilege of the writ of habeas corpus shall not be suspended except in such times of invasion or domestic insurrection as the public safety may require.

Very few laymen and very few members of Congress and very few attorneys ever have any reason to try to investigate what on Earth that clause means. What is the privilege of the writ of habeas corpus?

Typically, it applies to persons who are held in prison and are in physical custody of some kind. It is a remedy.

If the power to issue that writ to persons in prison—if that clause in the Constitution means that the Supreme Court can issue the writ and the privilege of seeking the writ cannot be taken from them—except when in times of actual invasion or domestic turbulence, Congress assesses the emergency and suspends the power of the court to grant the writ—it is possible that the habeas corpus clause states some limitation on what is otherwise, like the commerce power, a very broad power in this Congress to deal with the appellate jurisdiction of the Supreme Court as it wants to. It is, however, really a tough and complicated subject.

My paper, unfortunately, then could not confine itself to the first narrow topic of the scope of the power in the first instance. It must also deal with the probable impact of other clauses as they, in turn, may tend to cut into the power in particularized ways with regard to particular uses the Congress might make of otherwise what is a very broad power.

## PRACTICAL CONSTRAINTS

My prepared testimony also addresses some of the practical problems. If from our displeasure with the pattern of decisions by the Supreme Court in one area or another, we wish to keep from its capacity the ultimate decisional authority over those areas of our law, then we do run the practical hazards of having a fragmented Constitution, such that the meaning of the establishment clause—take the voluntary school prayer case, which I know interests you very considerably, Senator—which is just one clause, nonetheless, is a different meaning, depending upon whether you cross the State line between California and Nevada.

If the State Supreme Courts shall by determination of this body have the last word as to what constitutes an establishment of religion, then suddenly that clause in the Constitution really becomes a fragmented thing. One State says it forbids its activity, and another says it does not. The next says that it does, and we get a crazy quilt with no predictability of outcome.

There are additional practical problems if Congress were to seek to use this authority to insulate its own acts and not merely State legislation from ultimate determination in the Supreme Court. I suggest to you that it might breed a certain public incredulity—not necessarily that Congress is merely trying to check what it regards as usurpations by the Supreme Court but that, frankly, in many areas, it lacks confidence in the constitutional integrity of its own acts. It so lacks that confidence that it does not want the Supreme Court to be able to pass judgment on the underlying integrity of its own acts.

Mr. Chairman, I have tended to emphasize these things in my opening remarks, because with very few exceptions, respectfully, most of the efforts—of which there has been no successful example for a century—that have been mounted in Congress to utilize this authority since World War II—and there are roughly now 18 bills that have tried to trigger this power since that time—have been poorly conceived.

In my opinion, they were sufficiently artlessly drafted that they would have been held invalid by the Supreme Court without reaching the question that is before this committee—without necessarily saying that the power to make exceptions is limited by some sort of notion of essential function or something else.

On the basic proposition, I am with my colleague on this, as I am with Professor Wechsler, whom I anticipate you may hear in subsequent proceedings.

His view is perhaps more worthy than my own—most especially as we worked so closely with Henry Hart, who has been relied upon, quite inappropriately in my view—a deceased professor whose Socratic essay has been seized upon by some, suggesting a restriction that I do not find in the essay and do not believe is reflected in Professor Hart's view, and is not shared by his living colleague who has spoken to the same issue.

### THE ULTIMATE UNCERTAINTY OF THIS POWER

There is no case law on this subject that is ultimately dispositive. We have no court case that tests what constitutes an alleged essential function. Therefore, it is impossible to say flat-footedly that it has no merit. It has, however, as little merit as a scholar can intelligently assert about any proposition of mere argumentation.

Beginning with the constitutional convention in Virginia and beginning with the utterances of Governor Randolph, who was a party at the Philadelphia Convention, and statements by John Marshall at the ratifying convention, and carrying on through unqualified iterations by the third Chief Justice of the United States, Oliver Ellsworth, and identical utterances by Chief Justice Marshall and identical utterances by his successor, Roger Taney, and identical utterances by his successor, Sam Chase, a Lincoln appointee, and an identical utterance by Chief Justice White right on through the modern court with people who disagreed within themselves as much as did Justices Rutledge and Frankfurter 20 years ago, there is simply no qualification to the general position that "such exceptions as Congress shall make" means what it says, Mr. Chairman. Whatever exceptions Congress sees fit to make with regard to those cases which might otherwise be adjudicated in the Supreme Court.

Marshall said in the Virginia debates: "What is the meaning of the term exceptions? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction as to law and fact of the Supreme Court. These exceptions certainly go far as the legislature may think proper for the interest and liberty of the people."

The fact is that not for the last century has Congress in its wisdom, which I endorse, thought it prudent to withdraw from the court the power to decide constitutional questions. That forbearance cannot be translated into the proposition that, therefore, the power is not there. It is an argument much like an argument that says that this shotgun is incapable of killing a pheasant, the proof of which is that thus far no pheasant has been shot with this shotgun. It is just a hopeless non sequitur, Mr. Chairman.

Deep down, my own conviction professionally is that the argument of essential function is no more profound than that. Indeed, in the beginning that element of Federal judicial power which was more enthusiastically emphasized as justifying the provision for a Federal court system was really on that group of cases which today we think rather unimportant, that involve no Federal questions, no constitutional issues, no interpretations of Federal statutes—that element of Federal judicial power that goes to the mere diversity of the litigants, the plaintiff being the resident of one State and the defendant the resident of another.

Most of the enthusiastic arguments put forward to create a Federal court system were to supply neutral forums for the "essential" function of having a neutral forum when the plaintiff is from one

State and the defendant is from another, and there is a sense of bias to allow the courts of either State to finally adjudicate a case or controversy between them.

In the origins of the country, with jealousies between the States and restrictive tariffs and discriminatory State practices and anxieties about biases inhabiting the State courts, diversity jurisdiction was seen as a very important element. Others might characterize that as an essential function.

People simply disagree as to what is an essential function. The clause is not so confined and leaves to the discretion of Congress as to what it deems adequately essential under the circumstances as to leave that modicum of reconciling adjudicative power in the Supreme Court.

Let me desist, because I am very pleased that my colleagues—not all of whom agree with this—are here. Hopefully, we may make this more productive by having a sharper contrast of views.

Thank you.

Senator HATCH. Thank you, Professor. We are certainly happy to have your excellent statement, as we are all of you.

[The prepared statement of Professor Van Alstyne follows:]

## PREPARED STATEMENT OF PROF. WILLIAM VAN ALSTYNE

### Introduction

The subject of these hearings is the extent to which Congress may control the appellate jurisdiction of the Supreme Court. The importance of subject is obvious:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining in the court is that of announcing the fact and dismissing the cause.
>
> Ex parte McCardle, 74 U.S. 506, 514 (1869)

It follows that to the extent Congress may control the Supreme Court's appellate jurisdiction, it may thereby remove from that Court the capacity to "declare the law."

The great importance of this subject is not diminished, moreover, merely because these hearings focus only upon the extent to which Congress may control the appellate jurisdiction of the Supreme Court. To be sure, certain kinds of cases can originate in the Supreme Court itself, and these hearings do not presume to investigate any power in Congress to deal with those cases. But while such cases are not wholly unimportant, they do in fact involve only a minute portion of all cases ordinarily within the jurisdiction of the Supreme Court. They are cases which, in the language of Article III, are those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." But even most of the important cases "in which a State shall be Party" do not arise under the Supreme Court's original jurisdiction. Rather, the vast majority of all such cases are those in which a state prosecutes an individual for crime, and commences that prosecution in its own courts. Such cases subsequently come to the Supreme Court, if at all, not under its original jurisdiction but under its appellate jurisdiction. Cohens v. Virginia, 6 Wheat. 264 (1821).

In essence, then, these hearings focus upon the extent to which Congress may deprive the Supreme Court of most of the judicial Power of the United States. That judicial power, as described in Article III, and as vested by Article III "in one Supreme Court," is very broad. According to the provisions of Article III, it extends to:

> [A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In respect to all of these cases and controversies (with the exception of the very small number I have noted above as coming within the original jurisdiction of the Supreme Court), Article III expressly provides that "the Supreme Court shall have appellate Jurisdiction . . . . (emphasis added.) Essentially, then, the power of Congress in respect to the appellate jurisdiction of the Supreme Court is a power that relates to "ninety-nine and forty-four hundredths" (99 44/100 %) of the whole judicial power of the United States vested in the Supreme Court. Included within this overwhelming percentage are nearly all cases which adjudicate the ultimate legal interpretation of Acts of Congress and of Treaties of the United States, and nearly all cases which adjudicate the constitutionality of actions by the national government and by state and local governments as well.

The subject, and the significance, of these hearings is thus not only clear but breathtaking as well: what power, if any, does this Congress possess to remove from the Supreme Court of the United States most of its power (*i.e.*, its appellate jurisdiction as vested by Article III) without which it cannot function as an independent, co-equal Department to check the constitutionality of what Congress enacts as law, the President enforces as law, or the States apply as law, to the citizens and the people of the United States?

Merely to have raised the question in this fashion is surely to imply an answer most people have long supposed to be the correct one. Whatever original controversy may have attended the early constitutional adjudications of our Supreme Court, the identification of these very functions as constituting the essential distinction of the Supreme

Court is almost universally accepted both here and abroad. Indeed, it is the power to withhold judicial enforcement from Acts of Congress and from state action which (in the Supreme Court's view) are not constitutional that has made the United States Supreme Court a subject not merely of national importance but of international interest.

At the time our Constitution was adopted, virtually no other high court of any nation was vested with this kind of power. Increasingly, and especially since World War II, however, a number of nations have adopted written constitutions and have established supreme courts on the American model. (West Germany, Japan, and India are such countries.) The very essence of the American model is the immutable, co-equal importance of the Supreme Court with Congress and with the President: to "declare the law," including the law of the Constitution itself on all matters within the judicial power by the United States. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). The independence of the Supreme Court from Congress, in respect to its powers as vested by Article III, is thus taken for granted. It must surely be widely supposed that, consistent with the assumption of that inviolable independence, Congress may neither "overrule" the Supreme Court nor interfere in any significant way with its Article III powers of adjudication.

Virtually all are aware that to insure their independence, the federal judges (including of course the Judges of the Supreme Court) are appointed for life: their terms may not be limited, they submit to no popular elections, and their compensation "shall not be diminished during their Continuance in Office." They serve, rather, "during good Behaviour," and may be subject to removal only by the extraordinary ordeal of impeachment as provided in Article II, Section 4 of the Constitution (a process never successfuly employed against a single Supreme Court Justice). These various extraordinary insulations are doubtless meant to cement the independence of the federal judiciary in respect to the exercise of "the judicial power of the United States." Almost unquestionably, it must therefore also be assumed by most citizens of the United States (as well as by most foreign nations that have been interested in the American cosntitutional model) that this Congress cannot restrict the judicial power (i.e., the appellate jurisdiction) of the Supreme Court any more, for instance, than it may seek to take from the President some portion of "the executive power" and presume to vest in it some lesser official or, indeed, to take it from the President and not vest it in anyone but, rather, simply eliminate it.

Despite these several observations, and despite these assumptions, however, the answer is not necessarily the answer that has been supposed. In respect to the President of the United States, Article II directly vests "the executive power" in the "President of the United States," and there is no clause in Article II or in any other Article of the Constitution authorizing congress to take any portion of "the executive power" from the President. In respect to the Supreme Court of the United States, the matter is, alas, much more complicated.

In its opening passage, the provision in Article III respecting the judicial power of the United States is virtually equivalent to the opening passage in Article II respecting the presidency and the executive power. Thus, it provides:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Thereafter, in Section two of the same article, the exact scope of "the judicial power" is described: it extends to all of those cases quoted previously in this Introduction. Following at once, as we have already noted, the Supreme Court's own jurisdiction in respect to all of those cases within "the judicial power" is set forth: original jurisdiction over some few kinds of cases and then, the section goes on:

> In all the other Cases before mentioned, the supreme court shall have appellate jurisdiction, both as to Law and Fact . . . .

Up to this point, then, the power of Congress with respect to the Supreme Court appears to be no different than the power of Congress with respect to the President. The Constitution describes "the executive power," the Constitution vests the whole of it in "a President," and the Constitution no where grants to Congress any enumerated power to take from the President any portion of "the executive power." Similarly, Article III describes "the judicial power," it prescribes its mandatory vesting in "one supreme Court," and it thereafter prescribes the two different modes of jurisdiction of that Supreme Court in respect to the whole of "the judicial power."

To draw close, finally, to the exact focus of these hearings, however, it now becomes necessary to notice the rest of the sentence which is incompletely quoted above. It is a provision that has no equivalent in Article II (respecting the executive power and the President). It speaks of some power in Congress to *restrict* the Supreme Court's appellate jurisdiction:

> In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*.

What, then, does this clause mean? What "exceptions" is Congress empowered to make to the appellate jurisdiction of the Supreme Court (quite apart from its enumerated power to prescribe "Regulations" in respect to the Supreme Court's appellate jurisdiction)? This question, technically, is the proper one addressed in these hearings. There is an immense abundance of professional writing devoted to it, and I have collected most of that writing in a compendious footnote accompanying this Statement. There are also many utterances on the subject in *dicta* from the Supreme Court itself, only a sampling of which I am able to provide in this Statement. Because of this material, because some matters left out of account here will doubtless be amply covered by other witnesses (whose statements I have had no opportunity to see), and because I have tried more comprehensively to provide my own view of the matter in a published article already available to the Committee (See, Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229-269 [1973]) as well as in previous Hearings before a Senate Committee (See *Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. [1968]), I shall not attempt to address every possible consideration of this very perplexing subject. Rather, trusting to the adequacy of these other sources, I want here to confine myself to four aspects of the question before the Committee:

1. What *may be within* the power of Congress in respect to making "such Exceptions" as it wishes to make to the appellate jurisdiction of the Supreme Court?

2. What is quite *clearly not within* that power?

3. How may other clauses in the Constitution *separately* limit Congress in respect to its authority to make such exceptions as it might wish?

4. What considerations of policy and of statescraft should inform Congress respecting the wisdom and practicality of limiting the Supreme Court's appellate jurisdiction?

I genuinely regret that even an address to these matters must necessarily leave a great deal out of account. What follows is more summary than it ought to be, though it is longer than I would wish.

## I. The Disputed Scope of the Power of Congress to Make Exceptions To The Appellate Jurisdiction of the Supreme Court.

There are at least ten plausible and different interpretations of the "exceptions" clause. Most of these are not, however, mutually exclusive. Rather, they are cumulative and ascending. That is to say, they range from examples of interpreting the clause which examples are extremely modest and relatively uncontroversial, through others which examples are inclusive of the more modest interpretations but are themselves increasingly broad and increasingly controversial. I have chosen to segregate these interpretations into two general categories: those interpretations (and examples) that clearly constitute an "exception" to the appellate jurisdiction of the Supreme Court as described in Article III itself, but which nonetheless do not take from the Supreme Court *any* of "the judicial power of the United States" as described in Article III; and those interpretations (and examples) which, in the "exceptions" they make respecting the appellate jurisdiction of the Supreme Court, *do* take away from the Supreme Court some portion of "the judicial power of the United States."

My reason for proceeding in this fashion is to deal at the outset with ways of making sense of the "exceptions" clause which are nonetheless consistent with the popular view that the Supreme court is the *Supreme* Court in respect to "the judicial power of the United States" such that, one way or another, by one means or another, *every* case within that judicial power must be subject to *final* adjudication not in some lesser court (*e.g.*, a state court or an "inferior" federal court), but in the Court which is the *Supreme* Court of the United States. Interpretations of the "exceptions" clause, consistent with this view, should be welcomed by all who believe that Congress ought no more be deemed to have power to remove judicial power from the Supreme Court than it can remove excutive power from the President. Such interpretations would eliminate this entire controversy, provide symmetry in the national government, and make sense of every word in Article III itself. They would insure that the *whole* of "the judicial power of the United States" is vested in one supreme Court ultimately (even granted that, subject to Supreme Court powers of review, much of the judicial power may be lodged in inferior federal courts in the first instance), and yet make the provisions respecting the power of Congress to make exceptions to the Court's appellate jurisdiction both intelligible and useful.

A. Interpretations of the "Exceptions" Clause Consistent with Leaving All of the Judicial Power of the United States (ultimately) vested in One Supreme Court.

There are (at least) three such interpretations. The first two are supported in the case law, but neither has ever been regarded by the Supreme Court as exhausting the congressional power. Because they are not regarded as either controversial or as exhaustive, I present them in bare summary:

1. An "exception" may be made (or a "regulation" provided) by adding to the appellate jurisdiction of the Supreme Court (as that jurisdiction is described in Article III) some cases which otherwise it might hear only under its original jurisdiction. An example is of a suit by the United States against a state, which Article III permits to be brought in the Supreme Court, but which, by Act of Congress, may currently also be brought in federal district court, subject to ultimate review in the Supreme Court.

2. An "exception" may be made by Congress eliminating a procedure by means of which appellate jurisdiction was formerly exercised, leaving unaffected, however, some other procedure by means of which that appellate jurisdiction can still be exercised. (The example may, of course, also be seen as a mere "Regulation," rather than an "exception" respecting the Supreme Court's appellate jurisdiction.) This was allegedly the case, and upheld as such, in *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

3. An "exception" may be made by Act of Congress which adds into the Supreme Court's original jurisdiction the power (or duty) to hear a kind of case that would otherwise come only within its appellate jurisdiction. For instance, if Congress thought that a suit brought by the United States itself were of sufficient

exigency, or that at least certain kinds of cases brought by the United States were equal in importance to those affecting Ambassadors or other foreign ministers to the United States, it could provide that such cases may be brought in the Supreme Court. Accordingly, the Supreme Court ought not hold any such Act of Congress unconstitutional, as it fully fits the language of Article III, it serves an entirely logical policy, and in no respect diminishes "the judicial power" all of which remains fully vested in one Supreme Court.

Alas, this last interpretation of the "exceptions" clause has been rejected. The implications of the case rejecting it, moreover, are strongly to the effect that when Congress makes an "exception" to the Court's appellate jurisdiction, as distinct from merely making a "Regulation" (or as distinct from legislating pursuant to the necessary and proper clause in Article I), it does so by removing a case, or a kind of case, altogether outside the Court's jurisdiction, Ironically, the case that rejected this last excellent interpretation of the "exceptions" clause ("excellent" because it would make sense of the clause and disallow exceptions of any broader kind), is the most famous case in our country's history: Marbury v. Madison, 5 U.S. 137 (1803). For the issue in the case was precisely whether an Act of congress providing for Supreme Court original jurisdiction over a case clearly within the judicial power, but (otherwise) reserved by Article III to the Court's appellate jurisdiction, was valid as one kind of "exception" Congress may make. A unanimous Court, through Chief Justice Marshall, held that it was not. It was the first Act of Congress to be held unconstitutional by our Supreme Court. And the holding of the Court was that the Article III provision of the Court's original jurisdiction is an unexpandable limitation on cases within that original jurisdiction. The implication was plain, moreover, that the use by Congress of the power to make "exceptions" to the Court's appellate jurisdiction was not merely a modest power to relocate those cases elsewhere, within its original jurisdiction, or to describe procedures, but to take them away altogether. We turn, then, to additional interpretations and cases of that kind.

### B. Interpretations of the "Exceptions" Clause that Permit Congress to Diminish the Judicial Power of the United States Which the Constitution Vests in One Supreme Court.

Some very few clauses in the Constitution are expressly limited in respect to the use they permit Congress to make of the particular power they vest in Congress. Most, however, are not. And as to the latter, generally such restrictions as the Supreme Court has held applicable to those legislative powers, it has drawn not from some "implied" limited purpose or purposes which may have been persuasive to the country as reasons sufficient to confer such powers upon Congress, but from limitations imposed by other provisions in the Constitution: Provisions that generally cut across all of the enumerated powers and forbid any of them to be employed in certain ways, for certain purposes, and with certain consequences.

I would respectfully urge this Subcommittee to hold this distinction firmly in mind. For concluding in this section, as I shall, that the power vested quite explicitly in Congress to make "such Exceptions" to the Supreme Court's appellate jurisdiction as Congress feels inclined so to do (*i.e.*, that the power thus granted is indeed unrestricted by any limiting term or implication of the "exceptions" clause itself), I do not mean at all to suggest that therefore it is not restricted at all. Restrictions there undoubtedly are, but they issue from other clauses in the Constitution. We shall notice significant examples of those other limiting clauses hereafter, just as we shall also notice a number of eminently practical reasons why, apart from any restrictions the Constitution itself imposes, it may be extremely inadvisable for Congress to make certain uses of its power over the appellate jurisdiction of the Supreme Court.

As distinct from academic commentators, however, from the very beginning virtually no Justice of the Supreme Court has read the "exceptions" clause to mean less than it says. It says that the Supreme Court shall have that modicum of appellate jurisdiction conferred upon the Court by force of Article III itself

> with such Exceptions, and under such Regulations as the Congress Shall make.

The quoted language is, significantly, not accompanied by any kind of "provided, however," language or limitation. It does not say, for instance, any of the following:

> provided, however, that such exceptions Congress shall make, shall only affect the Court's appellate jurisdiction respecting such findings of fact as may already have been determined by a jury, and not its appellate jurisdiction respecting alleged errors of law.

Or:

> provided, however, that such exceptions Congress shall make, shall only affect so much of the Court's appellate jurisdiction as depends upon the nature of the parties to the case, and not its appellate jurisdiction insofar as that jurisdiction is based upon the subject matter in dispute between the parties;

Or:

> provided, however, that such exceptions Congress shall make, shall not, in the aggregate, exceed the balance of appellate jurisdiction not excepted from the Supreme Court;

Or:

> provided, however, that such exceptions Congress shall make do no more than to exclude from the Supreme Court's appellate jurisdiction such cases as may reasonably be regarded as resting on some de minimis amount, some insubstantial injury, or some trivial question of law;

Or:

> provided, however, that such exceptions Congress shall make with respect to cases withdrawn from the Supreme Court's appellate jurisdiction are otherwise provided for in vesting that jurisdiction in some other federal court:

Or:

> provided, however, congress may not withdraw from the Supreme Court such appellate jurisdiction as is necessary to secure that Court's judicial power to:
>
> a) resolve inconsistent or conflicting federal or state interpretations of federal law (statutory, treaty, and constitutional);
>
> b) uphold the supremacy of federal law over the states in any conflict with state law or authority; and
>
> c) protect every person in respect to any constitutional right guaranteed to them by this Constitution.

Each of these (imagined) "provided, howevers," enjoys some modicum of academic sponsorship. None is supported in any holding by the Supreme Court. None is supported by anything in the language of Article III. And none (including the last, the so-called "essential functions" limitation), is supported by any statements yet discovered from the Philadelphia convention of 1787, Madison's Diary, the Federalist Papers, the Minutes of the several state ratifying conventions, or any other original source. To the contrary, what little there is on the matter is, in its respect to this clause, quite similar to original expressions of reasons in respect to that power vested in Congress, in Article I, to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Quite specific commercial concerns animated the discussion and background of the commerce clause. Principally, these were concerns to overcome state tariff barriers, discriminatory (self-favoring) state taxes, and a desire to secure a nationwide free trade zone and untrammeled foreign commerce, unhampered by state laws. The power granted to Congress, however, was not framed to confine Congress only to these salutary uses of its vested power "to regulate Commerce . . . among the several States." The power vested in Congress was, rather, vested as a plenary power such that however Congress regulates that commerce, and with whatever effect it regulates that commerce, so long as the Act of Congress does no more (nor less!) than "to prescribe the rule by which [that] commerce is to be governed" (Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)), the Act of congress is within this enumerated power. Acts of Congress have thus been sustained which severely restricted trade, rather than advanced it. Acts of Congress have also thus been sustained when they approved discriminatory state laws, rather than disapproved them. Whether most or even many of such statutes would have been voted for personally by those who approved the vesting of this plenary power in Congress has never been a relevant question: the question is not whether such particular uses are wise, nor even whether such particular commerce-restricting laws would be regarded by many who supported vesting this power in Congress as subversive. The power granted was not restricted to "wise" or to "unsubversive" use by Congress. Rather, as Chief Justice Marshall observed:

> This power, like all others vested in Congress [compare the exceptions clause in Article III], is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. . . . The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relief, to secure them from its abuse.
>
> Gibbons v. Ogden, supra at pp. 196-97 (emphasis and brackets added).

Quite similarly, when the "exceptions" clause was before the Virginia ratifying convention on June 20, 1788, John Marshall had spoken of it in indistinguishably broad terms:

> What is the meaning of the term exceptions? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to

> the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.
> 3 ELLIOTT'S DEBATES 560 (2d ed. 1888)

His observation was essentially seconded by the remarks made by Governor Randolph (who had participated in the Philadelphia Convention just the preceding year), the very next day, on June 21, 1788:

> It would be proper to refer here to *any* thing that could be understood in the federal court. They [Congress] may except generally both as to law and fact, or they may except as to law only, or fact only.
> 3 ELLIOTT'S DEBATES 572 (2d ed. 1888)

And, following his confirmation as the fourth Chief Justice, Marshall's utterances continued in exactly the same fashion. Thus, in *United States v. More* (7 U.S. [3 Cranch] 159, 173 [1805]),(emphasis added) he noted in respect to the Judiciary Act passed by congress in 1789:

> As the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, *prohibiting the exercise of other powers than these described*.

Five years later, Chief Justice Marshall expressed the same opinion yet again:

> The appellate powers of this court are not given by the judicial act. They are given by the Constitution. *But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject*.
>
> When the first legislature of the Union proceeded to carry the third article into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court.
> *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810) (emphasis added).

It is instructive, moreover, that consistent with the Judiciary Act of 1789, a large number of cases otherwise plainly within "the judicial power" of the United States (as described in Article III itself) did not vest in *any* federal court, whether originally, by removal, or by any other mode of appellate review. Even a significant amount of "federal question" jurisdiction (which until 1875 was for purposes of original jurisdiction left predominantly to state courts) could come within the "appellate jurisdiction" of the Supreme Court far short of the complete authorization otherwise allowed by Article III. Indeed, state court interpretations of federal statutes and of the Constitution itself were made unreviewable in the Supreme Court generally, in the event the interpretation of such a statute (or of the Constitution) favored, rather than disfavored, the party relying upon that law. Additionally, federal criminal cases were committed to lower federal courts with no provision made for review in the Supreme Court by appeal or by writ of error; and while some recourse to the Court's appellate jurisdiction was possible by means of writs of habeas corpus (or by certification of certain questions by the lower courts), the means thus provided fell significantly short of confirming the Supreme Court's appellate jurisdiction in respect to all cases arising under the laws of the United States -- because habeas corpus would not reach all such cases.

In these several respects and in others (e.g., restricting diversity jurisdiction in the lower federal courts and limiting the Supreme Court's diversity appellate jurisdiction in regard to state courts and lower federal courts alike), "exceptions" have existed ever since the Judiciary Act of 1789 removing from the Supreme Court significant quanta of appellate jurisdiction tentatively vested in that Court by force of Article III.

The views of Chief Justice Marshall, reflected in the fact of the Judiciary Act of 1789, are not peculiar. To the contrary. In the COMMENTARIES of his highly regarded contemporary, Mr. Justice Joseph Story, while Story repeatedly expressed frustration respecting the withholding of certain jurisdiction of cases well within the judicial power under Article III, he reluctantly concluded that Congress could indeed restrict the Court's appellate jurisdiction by affirmative legislation:

> It is apparent, then, that the exception was intended as a limitation upon the preceding words [describing the Supreme Court's appellate jurisdiction], to enable congress to regulate and restrain the appellate power, as the public interests, might, from time to time, require. * * * It [the provision in Article III in respect to appellate jurisdiction] leaves the power of [C]ongress complete to make exceptions and regulations; but it leaves nothing to their inaction.
>
> 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 453, 469 (1833) (brackets and emphasis added).

Marshall's views, moreover, were iterated by the Chief Justice who had preceded him and by every Chief Justice of the following half-century. Thus Chief Justice Oliver Ellsworth declared (cf. the dissent by Wilson):

> [E]ven the appellate jurisdiction is . . . qualified; inasmuch as it is given "with such exceptions, and under such regulations," as [C]ongress shall make."
>
> Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796).

So as well the next Chief Justice, Roger Taney, went even further:

> By the constitution of the United States, the Supreme Court possesses no appellate power in *any* case, unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes.
>
> *Barry v. Mercein*, 46 U.S. 5 (How.) 103, 119 (1847) (emphasis added).

Neither is there the least unclarity, qualification, or equivocation contained in the following statement by Mr. Justice Swayne, in the next Chief Justice's tenure, writing for a unanimous Supreme Court:

> The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. *But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given*, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.
>
> *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1865) (emphasis added).

Accordingly, it is not surprising that but four years later, Chief Justice Chase would summarize much that his predecessors had already acknowledged in the following review:

> In the case of *Durousseau v. The United States* (citation omitted), the whole matter was carefully examined [by Chief Justice Marshall] and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively, said the Court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."
>
> * * *
>
> We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513 (1869).

A dozen years later still, the next Chief Justice went even further in behalf of a an identically unanimous Court:

> [N]ot only may whole classes of cases be kept out of [our] jurisdiction altogether, but particular classes of questions may be subject to reexamination and review, while others are not.
>
> The "Francis Wright," 105 U.S. 381, 386 (1881).

These many self-denying Supreme Court statements have frequently been disparaged in recent decades. And the power in Congress (which these statements so emphatically acknowledge) has in fact been employed with very considerable, and highly commendable, legislative self-restraint. Virtually without regard to the felt "wrongness" or "lawlessness" of particular, highly controversial Supreme Court decisions, this Congres has historically understood the unwisdom of deploying its control over the appellate jurisdiction of the Supreme Court to take away tasks which Congress itself has regarded as essential for that Court to perform. (Indeed, in his most recent book Professor Charles Black emphasizes the fact of congressional power in respect to the Court, and the forbearance by Congress not to use that power, as evidence that the Court's decisions do, to that extent at least, enjoy democratic legitimacy. See C. BLACK, DECISION ACCORDING TO LAW 18-19, 38-39 [1981]). When, for instance, the Supreme Court (in 1793) construed Article III to permit a state to be sued without its consent in an inferior federal court by an out-of-state, private, assignee-creditor, there was immediate and widespread anger that the Court had "wrongly" interpreted the Constitution -- but Congress did not, on that account, remove from the Court the appellate jurisdiction to hear such cases. Similarly, the immense unpopularity of the infamous Dred Scott decision did not lead to an ad hoc restriction on the Court's jurisdiction, nor did the decision in the original income tax case, holding unconstitutional an unapportioned federal income tax reaching rental income from real estate.

Rather, in each of these (and in other) instances, rather than undertake a process of removing piecemeal the appellate jurisdiction of the Supreme Court (and leaving "authoritative" interpretations of the Constitution to unreviewable lower federal courts or unreviewable state courts, fragmenting the Constitution to mean different things in different states) Congress has moved, instead, to alter the Supreme Court's decisions by proposing amendments to the Constitution itself.

I entirely applaud this congressional forbearance. I will urge in this testimony that it continue, regardless of the provocation Members of this Congress may feel from whatever constitutional interpretations by the Supreme Court they believe to be offensive or wrong. But I cannot deduce from the almost unbroken forbearance of Congress, as others tend to do, that therefore Congress may not have it otherwise. Because Congress has virtually never sought to remove some aspect of Supreme Court appellate jurisdiction from pique with its particular decisions (the one clear effort to do so fell short solely because Congress had overlooked an obscure, alternative procedure left unaffected by its restriction at the time [see the McCardle case cited supra]), some commentators have deduced from this forbearance that therefore Congress lacks power to do so.

They do not put the matter in this fashion, to be sure, but their argument is based upon it nonetheless. Extraordinary academic efforts have been made to note how, in each author's own view, no particular restriction on the Supreme Court's appellate jurisdiction was a restriction which (in the author's view) affected any "essential" function of that Court. It may in fact be debatable how far that is actually true (as it depends very much upon one's own view of what are those "essential" functions, and what degree of difficulty or delay one may regard as abridging such an "essential" function). But it would be quite incorrect to suppose that from the general wisdom that has historically prevailed in Congress, i.e., that it makes no sense to start down the path of selecting statutes, or cases, or whole constitutional clauses to place beyond Supreme Court review, it therefore follows also that no such power in Congress exists. Indeed, in my own view, nothing is more likely to goad Congress into precipitatous and disastrous uses of its plenary power to make exceptions to the appellate jurisdiction of the Supreme Court than too passionately to argue a proposition almost surely false -- a proposition calculated to "challenge" Congress to test its ultimate power in this respect.

The breadth of the exceptions clause may in one sense never be tested unless Congress elects to test it through the national disservice of case-by-case removal from the Court's appellate jurisdiction of the occasions to reconcile conflicting interpretations of our national laws and of the Constitution itself among differing inferior federal courts and differing state supreme courts. But if Congress is challenged to "test" its power under Article III in this way (as it has not now for more than a century attempted to do), I believe we may enter an unfortunate and possibly irreversible process. For I think such Acts of Congress would be upheld, but that once done, we may then be unable to recall where we were before.

Stray and loose dicta by some few Justices have been plucked out of context to make the plenary power of Congress over the appellate jurisdiction of the Supreme Court seem quite confined. But the uses of those *dicta* are ordinarily misleading. It has been noted, for instance, that Mr. Justice Douglas once suggested, "There is a serious question whether the *McCardle* case could command a majority view today," *Glidden Co. v. Zdanock*, 370 U.S. 530, 605 n. 11 (1962). The quotation most frequently appears in writings that suggest that today's Supreme Court would not accept congressional restrictions on its appellate jurisdiction equivalent to those upheld in *McCardle*. But the context of Mr. Justice Douglas's dictum suggests something quite different and much more modest. It is, rather, that insofar as a case has already been briefed and argued on the merits in the Supreme Court, prior to the effective date of an Act of Congress affecting jurisdiction over that case already *sub judice* (a separate and difficult issue in the *McCardle* case itself), then in *that* respect it is questionable whether *McCardle* would be followed today. Indeed, what Mr. Justice Douglas *last* said on the *broader* question of congressional power over Supreme Court appellate jurisdiction was this:

> As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. See *Ex parte McCardle* . . .
>
> *Flast v. Cohen*, 392 U.S. 83, 108 (1968)

Other contemporary Justices, while disagreeing between themselves very strongly respecting other issues of constitutional interpretation, have spoken to the same matter in the same way. Thus, dissenting on other issues, Mr. Justice Rutledge nevertheless observed in 1944:

> [C]ongress has *plenary* power to confer or withhold appellate jurisdiction, cf. *Ex parte McCardle* . . . .
>
> *Yakus v. United States*, 321 U.S. 414, 472 (1944).

And the point was made more emphatically still, by Mr. Justice Frankfurter, in 1949:

> Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; *Congress need not give this Court any appellate power*; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*. *Ex parte McCardle* . . .
>
> *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (dissenting opinion) (emphasis added)

In a similar fashion, a fragment of a famous academic's hypothetical dialogue has been much relied upon, but this too may be quite misleading. In 1953, Professor Henry Hart wrote a superb and provocative article on the general subject of Congress and the federal courts. In elegant socratic fashion, he provoked his readers to think very seriously about the subject we have been examining. At one particular place, he suggested that arguably, "exceptions [made by Congress to the Supreme Court's appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." (Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 [1953]). The questioner in his dialogue then persists and asks whether the Supreme Court has "ever done or said *anything*" to suggest it is prepared to adopt such a view, to which the answer given is "No," for to be sure, Congress has thus far been very sparing in the use of its power and no occasion to address the question in this fashion has been required of the Court. (*Ibid*.) At the end, however, both parties to this imaginary dialogue recognize something left out of account. It is an examination of the *assumption* respecting "*the* constitutional plan" referred to in the earlier answer. The assumption was that "the constitutional plan" did not contemplate in Congress a power to determine how much, or how little, of "the judicial power of the United States" to repose in the Supreme Court. At the end, that question returns -- and Professor Hart's answer is a different, more subdued one. The question comes again, because the earlier answers "ducked the ultimate question, just as you've done so far." (*Id*. at 1401). And this is the response:

> A. I've given all the important answers . . . haven't I? I would have thought the rest was clear. Why, its been clear ever since September 17, 1787.
> Q. Not to me.
> A. The state courts. *In the scheme of the Constitution, they are the primary guarantors of constitutional rights*, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so, then we really would be sunk.
> *Id*. emphasis added.

In light of this fuller exposition, it is unsurprising that Professor Wechsler, co-author with Hart of the early edition of their justly regarded volume on federal courts, concludes as follows:

> I see no basis for this view [that the exceptions clause has a narrow meaning, not including cases of constitutional dimension] and think it antithetical to the plan of the Constitution for the courts -- which was quite simply that Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> Wechsler, The Courts and the Constitution, 65 COLUM. L. REV. 1001 (1965) (emphasis added).

Summary: In his impressive volume on the early history of the Supreme Court, Professor Julius Goebel noted that the "exception and regulations" clause of Article III of our Constitution "was not debated" in the Constitutional Convention of 1787. (J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, in HISTORY OF THE SUPREME COURT OF THE UNITED STATES 240 (P. Freund ed. 1971). Because that was so, it remains debatable even now. But short of that certitude which either a clearer constitutional history might have provided, or a series of specific Supreme Court decisions might have settled by adjudicative fiat, the evidence we have is quite overwhelmingly on one side.

Among the varieties of interpretation that have been suggested, two are most compelling. Personally, I would prefer that the first of these two were the correct one. According to that view, all of the "judicial Power of the United States" is vested in "one supreme Court," and, while Congress has no power to take from the Court any of the cases which Article III itself places within the Court's original jurisdiction, Congress might sensibly conclude that other kinds of cases were of equal importance so that they, too, should be heard within the Court's original jurisdiction. Whenever Congress so concluded, it could so provide. Thus, these cases, which would otherwise come only with the Supreme Court's appellate jurisdiction, would be excepted from that jurisdiction by being attached, instead, to the Court's original jurisdiction. This "reading" of Article III makes coherent use of all of its language, it leaves nothing out of account -- and it effectively insulates the Supreme Court from peicemeal legislative assaults. It preserves the Supreme Court equal to Congress and to the President (in whom "all legislative Powers" and in whom "the executive power" are respectively vested), whose respective legislative and executive powers cannot be divested by other departments of the national government.

But this plausible interpretation of Article III was rejected in Marbury v. Madison, and I surely cannot say that that decision was incorrect. Rather, the explicit provision of the "Exceptions" clause did contemplate a plan of the Constitution providing to Congress the decision of making "such Exceptions" (i.e., whatever exceptions) it might elect to make in respect to the Supreme Court's purely appellate jurisdiction. It might furnish a special, Article III federal court, for instance, as a specialized Tax Court of Appeals, with final authority to interpret federal tax laws. It might provide that jury determination of primary adjudicative fact would be final and irreversible in the Supreme Court. It might conclude that a variety of cases plainly within the judicial power of the United States were of insufficient importance to be heard in any inferior federal courts, and of insufficient importance to be heard in the Supreme Court as well. It might conclude, subject always of course to its power to change its mind, that the several state supreme courts (whose judges are bound by oath of office to enforce the Constitution and Laws of the United States) were appropriate and final adjudicative forums for certain kinds of cases. Nearly all of these examples find early illustrations in early Acts of Congress. And, as I have been at pains to recount, the Supreme Court itself has never intimated a different view of the matter.

The power in Congress to make such exceptions of cases may be then, like its other enumerated, plenary powers: granted without restriction on its possible uses, albeit provided on the basis of a variety of concerns that some uses of the power, as granted, might transcend. It is, in its different way, like the power to regulate commerce among the several states: a plenary power granted without restriction, hopefully to be employed so that commerce might be improved, but in terms that allows that commerce also to be restricted insofar as Congress thinks it suitable.

There is, moreover, less of a onesidedness to this view than may first appear. It appears to be onesided because it treats the relationship between Congress and the Supreme Court as a relationship, the terms of which Congress may tend quite onesidedly to dictate -- by the power to remove from the Supreme Court the occasions (i.e., the adjudication of cases) it has to invoke its independent, judicial power insofar as most such occasions come only within the Court's appellate jurisdiction. And it is that appellate jurisdiction which remains subject to such exceptions as Congress shall make. But closer attention to the relationship between Congress and the Supreme Court may dispel this first impression of onesidedness. For it leaves out of account the important remembrance that the Court also has the last word in respect to the powers of Congress. It may, by its own adjudications respecting the "meaning" of those clauses in our Constitution describing the powers of Congress, interpret them to diminish the powers of Congress -- as it sometimes, most assuredly, has done. Indeed, it can, should it wish so to conduct itself, presume even now to "re-interpret" the exceptions clause itself and deny to Congress the power to make such exceptions as Congress thinks suitable.

The Court and the Congress, like each in respect to the Executive, are thus partly independent and partly highly dependent -- upon one another. There is thus reason for each not lightly to attempt to diminish either of the other two branches of our national government, as they may, in turn, find themselves likewise open to equivalent diminishments. The system, in the end, is quite symmetrical. And it has worked exceptionally well.

## II. What is Clearly Not Within the Power of Congress in Respect to Such Exceptions as it May Make to the Appellate Jurisdiction of the Supreme Court.

The power to decide a case includes the power to decide the case according to the Constitution. And the power of the Supreme Court to decide a case according to the Constitution includes the power to decide the case according to the Supreme Court's own interpretation of the Constitution.

These two propositions are completely well settled. They are both explicit in Marbury v. Madison. "Defending" them would not only be a waste of this Committee's time, but in any event it seems entirely uncalled for. For nothing we have discussed thus far has brought them into question, and nothing about the subject we have been examining even seems to be relevant to them. What we have been discussing is the power in Congress to make such exceptions as it determines in respect to the appellate jurisdiction of the Supreme Court. Conceding that that power is a plenary one does not, of course, say anything about a wholly different kind of power -- a power to dictate to the Supreme Court the outcome of such cases as have not been withdrawn from its appellate jurisdiction.

Nevertheless, a number of Bills introduced into Congress during the past thirty years, and some few Bills introduced even earlier, have seriously neglected the full significance of this distinction. It may therefore be helpful to the Committee very briefly to note some of the less obvious, but correct implications of this distinction. There are four such matters, all four of which proceed from the proposition that the power vested in the Supreme Court to decide cases not excepted from its appellate jurisdiction by an Act of Congress includes the power to decide such cases consistent with the Court's own interpretation of the Constitution:

> 1. Congress may not legislate a rule of decision "binding" the Court to an outcome contrary to the Court's own view of an outcome otherwise required by the Constitution;
>
> 2. Congress may not so restrict such issues as may be heard in the Supreme Court that the foreclosure of judicial review enlists the Court as an active instrument in the violation of some constitutional right;
>
> 3. Congress may not so restrict the review of "findings of fact" in a given case as to enlist the Court as an active instrument in the violation of some constitutional right;
>
> 4. Congress may not so restrict the remedial powers of the Court in a given case as to enlist the Court as an active instrument in the violation of some constitutional right.

The first proposition is but a restatement of the obvious. The subsequent propositions are important, but less obvious, corollaries. Congress may keep from the appellate jurisdiction of the Supreme Court whole "cases." It may also regulate the court's appellate jurisdiction in respect to such cases that it does not see fit wholly to withdraw from the Court's appellate jurisdiction. And the latitude of the additional power to regulate is quite broad respecting the form of review, the scope of review, the procedure of review, and the kind(s) of judicial orders authorized or not authorized respecting the disposition of cases. This power in Congress is nonetheless bounded at all times by the separate, constitutionally-imposed oath that the Judges are required to take, and to observe, under Article VI: "to support this Constitution." As a consequence, neither the "exceptions" clause nor the "regulations" clause permits Congress to employ either or both powers (to "except" and to "regulate") in ways which would affirmatively involve the Judges to act inconsistently with that oath. And insofar as this is true, it will significantly affect the practical capacity of Congress to employ its "exceptions" power as extensively as Congress might otherwise attempt to do. Illustrations of each kind of problem may be useful to make this point.

Congress may be able to preclude U.S. Supreme Court review of state supreme court adjudications respecting the substantive constitutionality of various state anti-abortion statutes. The political decision to do this, however, may lead to a substantial amount of confusion and disarray. For instance, even assuming that the respective state supreme courts would not feel "bound" by prior U.S. Supreme Court decisions on the same subject in the practical sense that they would fear an automatic reversal of any judgment inconsistent with those prior decisions, still it may be anticipated that most (if not all) of the state supreme courts would respect those prior Supreme Court decisions as a matter of stare decisis. The chaotic uncertainty of an unstable fourteenth amendment, yielding unreviewable outcomes from state to state, yet all purporting to rest on the same fourteenth amendment, moreover, is discouraging. It counsels very strongly against an effort to except from the Supreme Court's appellate jurisdiction "all cases in which is drawn into controversy the substantive constitutionality of state laws regulating or prohibiting abortions."

Perhaps recognizing that this kind of bill is undesirable for these reasons (and for other reasons as well, e.g., federal district courts might still retain habeas corpus jurisdiction to re-examine and to reverse such state courts as departed from the Supreme Court's prior holdings on the same subject), some bills proceed differently: they contemplate appellate jurisdiction over such cases in the Supreme Court, but they purport to instruct that Court respecting the meaning of some word, or some phrase in the Constitution which may determine the outcome of the case on appeal. Such a bill may, for instance, presume to "find" that the word "person" as used in the fourteenth amendment extends to pre-viable fetuses, even for adjudicative purposes, and even though the Court itself has interpreted the same word otherwise. Whether the effort is rationalized as merely making a very limited "exception" to the Court's appellate jurisdiction (i.e., an exception merely not to review one issue in the case), or as a very limited "regulation", or as a pretense of merely purporting to "enforce" the fourteenth amendment itself, it comes to the same end. As the Congress may not direct the Court what result to reach in a given case, neither may it attempt to bind the Court to a particular view of one issue in the same case such that the result reached is thus indirectly dictated by Congress. Compare United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

Similarly, neither may Congress leave the case within the appellate jurisdiction of the Supreme Court, and yet "except" from that jurisdiction the consideration of some issues the proper consideration of which would, on constitutional grounds, necessarily produce a different outcome on the merits of the case than the outcome compelled on the merits in the absence of being able to consider the constitutional question. Such an "exception" or "regulation" involves the Court itself as an active agent adjudicating in violation of the judges' oath to support the Constitution. And, as the power to decide is, as Professor Hart observed, the power only to decide constitutionally, the Court must either decline to hear such a case at all or, in hearing it, hold invalid the particular issue-restriction imposed by Congress and proceed on the merits of the whole case. (I do not mean to suggest, of course, that Congress is without power to provide a specialized procedure which may significantly limit the occasion in which constitutional questions may be examined. Compare Yakus v. United States, 321 U.S. 414 (1944).)

In certain kinds of constitutional litigation, moreover, what others might customarily regard as "merely" findings of fact (rather than of law), i.e., the very kind of underlying "transactional" facts that juries (rather than judges) determine, are nonetheless matters that are inextricably tied to questions of constitutional law as well. In such circumstances, Congress may not leave the case within the appellate jurisdiction of the Supreme Court, and yet forbid it to review such findings of "fact," if the necessary consequence of that "regulation" or "exception" is again to produce a decision on the merits of the case involving the Court as an active agent in the violation of the Constitution. Two kinds of examples may be given.

It is well established, for instance, that if there is virtually no evidence according to which a jury could reasonably have concluded beyond reasonable doubt that a certain event occurred, their determination to the contrary, for purposes of imposing a deprivation of life, liberty, or property, lacks an essential of "due process." See, e.g., Thompson v. Louisville, 362 U.S. 199 (1960). Under these circumstances, a prohibition on the power of a court to re-examine findings of fact (to insure that the jury was not without an essential evidentiary basis for having "decided" the fact as it did), would itself be invalid.

In other areas, what is frequently submitted to a jury as an issue of "fact" is also a matter of constitutional exigency in order that a given statute, as applied, be within the Constitution. Thus, for instance, the "voluntariness" of a criminal confession is not merely a difficult factual question for juries; it is also a requisite of due process of law; the "obscenity" of particular graphic material is not only a hard question for juries, depending upon standards of community candor in respect to sexually explicit material, it is also a first amendment requirement that must be satisfied for such material to be suppressed when it presents no other danger. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974). In either kind of case (and in many others), foreclosing the Supreme Court, in the exercise of appellate jurisdiction not withdrawn, from re-examining such findings of "fact" may again necessarily involve the Court as an active agent in "affirming" violations of the Constitution. Such a restriction is itself invalid.

Equally, if Congress leaves within the appellate jurisdiction of the Court the power to "decide" a case on the merits, and yet so denies or restricts any "remedy" the Court is authorized to use with respect to its decision that in no meaningful, constitutional sense can it be said that the prevailing party's constitutional rights have been vindicated (rather than forfeited), that, as well, is unconstitutional. Congress does, of course, have great latitude in respect to the furnishing of legal remedies. But in no case may it so reduce remedies to such an extent that, in the Court's own view, its inability to furnish such remedies is essentially not different than to make the prevailing party the "losing" party instead. In brief, minimal remedies, imperative to the very substance of a constitutional right, may not be forbidden under claim of the "exceptions" or "regulations" clause.

In these several respects, then, the power of Congress in respect to adjudications by the Supreme Court is not at all a "lesser included" power of its power to make "exceptions" to the Court's appellate jurisdiction. In general, the message here is meant to be a large and practical one. Not the least check on the unwise or precipitous use by Congress of its power to make "exceptions" is the realization of what it means to do without the Court's own, reconciling role in the interpretation of our laws and of our Constitution. The Congress may, to a very considerable extent, dispense with that role. But it may not do the very different thing which in any fashion involves the Supreme Court itself in the disregard or violation of the Constitution.

## III. Restrictions on the Power of Congress Incidental to Other Clauses.

The power of Congress, to make "such Exceptions" and provide "such Regulations" to the Supreme Court's appellate Jurisdiction as Congress shall generally deem necessary and proper, is not exempt from constitutional restrictions otherwise applicable to all that Congress does. A comprehensive review of those restrictions generally is plainly beyond the scope of these Hearings, as indeed they compose a significant number of clauses in the Constitution and the Bill of Rights. It may nontheless be useful to provide several examples of such restrictions as they may specially affect this subject, possibly in ways neither generally understood nor completely well settled.

Article I, Section 9 of the Constitution provides that:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

"Habeas corpus" is a writ generally available only to persons whose physical liberty is being restricted in some significant way, e.g., persons in jail. When it is available, moreover, it is not available as a substitute for an ordinary appeal. The kinds of issues subject to examination on habeas corpus are limited; generally, they go only to determine the jurisdiction of the person keeping custody of the petitioner. But in American practice, insofar as the custodian of the petitioner (typically, a named state or federal prison warden) shows to the court that his basis for confining the petitioner is a judgment from some other court, the inquiry made pursuant to a petition for a writ of habeas corpus is not limited to the narrow determination as to whether the jailer holds the petitioner by force of a judgment within the statutory authority of the sentencing court; it goes also to the review of constitutional error which, for this purpose, is deemed to render the continued imprisonment of the petitioner without "jurisdiction."

Insofar as this is true, then it is arguable that the Habeas clause in Article I, Section 9, may in some cases limit the power in Congress with respect to the jurisdiction of the Supreme Court to issue writs of habeas corpus and, in such cases, to adjudicate the substantive constitutionality of state or of federal statute securing the conviction (and accounting for the imprisonment) of the petitioner. This subject is separately, in its own right, both complicated and controversial. I cannot here do more than to identify the problem. (For a recent and highly provocative treatment of the issue, see Paschal, The Constitution and Habeas Corpus, 1970 DUKE L.J. 605.)

Similarly, Article I, Section 9 also provides against Congress that:

> No Bill of Attainder . . . shall be passed.

Classically, a "Bill of Attainder" was an Act in Parliament identifying named individuals, charging them with specific crimes, finding them "guilty" of such crimes, and imposing severe punishment upon them. In this country, however, the provision has been construed more liberally to reach varieties of legislative punishment imposed without judicial trial, including the disabling of persons merely from access to important civil privileges (e.g., practicing law, or access to the National Labor Relations Board). See, United States v. Brown, 381 U.S. 437 (1965); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867). If, then, Congress were to "except" from the appellate jurisdiction of the Supreme Court cases identified by a category of appellants (e.g., cases in which the appellant is a member of the Mafia, cases in which the appellant has secured an abortion) under circumstances making clear that the disability thus imposed reflected a punitive legislative purpose for imposing it, arguably such a use of the "exceptions" power may raise a substantial question under this clause. Generally, however, insofar as exceptions may be made according to the kind of case (rather than according to identified characteristics of the appellants involved in such cases), it is difficult to suppose that the attainder clause presents any substantial limitation.

On the other hand, the matter is much less clear in respect to such limitations as may apply to the "exceptions" power of Congress insofar as the limitations are based not on the attainder clause, but on the implied equal protection and express due process clause of the fifth amendment. The "due process" clause is not involved in this controversy in its most conventional usage, *i.e.*, a concern for procedural due process. It is not involved because, clearly, access to the United States Supreme Court and/or a hearing on the merits of one's claim in the Supreme Court, is itself not part of that "due process of law" without which "No person . . . shall be deprived of life, liberty, or property." (Rather, the due process clause would come into play in this respect, procedurally, only if Congress not merely made exceptions to the Supreme Court's appellate jurisdiction, but also attempted to foreclose jurisdiction in inferior federal and state courts alike in respect to federal or state action which, when undertaken, would (allegedly) deprive persons of some modicum of liberty or some element of "vested" "property" without any adjudicatory recourse consistent with minimally fair hearings standards required by the fifth amendment.)

The due process clause may be implicated substantively, however, if Congress were to make an exception to the Supreme Court's jurisdiction with respect to certain kinds of cases in a setting where the manifest purpose and effect of the Bill is to encourage substantive adjudicative outcomes in violation of any person's pre-existing, substantive constitutional right as previously determined by the Supreme Court of the United States. It is arguable (albeit only arguable), for instance, that if removal of appellate jurisdiction from the Supreme Court is integrally a part of legislation the purpose and effect of which is the effective "overruling" of Supreme Court interpretations respecting the constitutionally-vested, substantive rights of individuals, the Act so providing may conflict with the fifth amendment.

It is similarly arguable that the selective removal of cases from the appellate jurisdiction of the Supreme Court, in a setting where the manifest purpose and effect is to disadvantage a class of litigants from equivalent opportunities of securing review of the constitutional claims in that Court as other classes of litigants are assured in the same Court, may raise plausible, fifth amendment equal protection claims. Clearly, it would be so, for instance, if the class of litigants so selected were identified, not by the nature or subject matter of the case, but by some personal characteristic, peculiar to the class, and already well-established as a constitutionally odious or arbitrary basis of legislative action, e.g., by race, religion, political affiliation, or gender. It is not nearly so clear, however, where the class of litigants is identified merely by the common nature of the claim forbidden to be heard and, as to this, there is ample reason for competent persons to disagree.

I regret that I cannot do more than to suggest these few possibilities (and some several difficluties) that may thus indirectly bear upon the power of Congress to make such exceptions as it otherwise is authorized to do by Article III. But we can no more exhaust these other clauses in this Hearing, than we could do in respect to any other otherwise plenary power of Congress (e.g., to regulate commerce among the states), without benefit of either focusing upon quite particular bills or literally pursuing an unabridged review of the entire Constitution. My point remains: broad as the power is in Congress to make exceptions to the appellate jurisdiction of the Supreme Court, it is not exempt from other constitutional provisions, lying outside the "exceptions" clause, that indeed describe limitations that cut across most of the enumerated powers of Congress.

## IV. Considerations of Practicality and of Statescraft in the Use of The Exceptions Clause

Overwhelmingly, such exceptions as Congress has provided with respect to the appellate jurisdiction of the Supreme Court have been in the interest of the judiciary. Very occasionally, Acts of Congress affecting the judiciary have also reflected legislative misgivings respecting the very aggressive uses federal courts have sometimes made of their equitable powers. (Norris-LaGuardia restrictions on injunctions with respect to labor disputes, and the restrictions respecting jurisdiction over claims against the collection of taxes, reflect such misgivings.) Virtually never, however, has Congress sought to preclude all recourse to the Supreme Court for the purpose of leaving finality of constitutional interpretations irreconcilably to the unreviewable determination of inferior federal courts or to the numerous state supreme courts. The last enacted attempt by Congress to do so, for the purpose of preventing the Supreme Court from adjudicating a case challenging an Act of Congress on constitutional grounds, was in 1868. Technically, the attempt failed -- because Congress had overlooked an obscure alternative procedure which remained available contrary to Congress's misunderstanding. See, Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) and compare Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869).

Since that time, no similar attempt has yet found favor with Congress itself. I would, respectfully, urge this Congress not to break with this record of the past one hundred years. I do so, not so much for "the Court's sake," nor even especially for "the nation's sake," but rather, also for the sake of Congress. This Congress is not in the general business of "approving" decisions of the Supreme Court. Least of all do people generally seek to hold Congress accountable for the Court's interpretations of the Constitution. But an Act of Congress effectively disabling the Court from adjudicating any one kind of state (or federal) law, on no better basis than that Congress believes that in respect to that kind of law the Court is "incorrect," virtually declares that such laws Congress does not remove from Supreme Court appellate jurisdiction it must believe to be dealt with "correctly" by the Court. If you are excused in the one instance for diminishing the Supreme Court as a co-equal Department because you are of the opinion it has abused "the judicial power," you are not to be excused if, then, you fail in every other instance of alleged "abuse" from acting likewise.

It is not, moreover, merely because such state (or federal) laws that you might seek to insulate from appropriate challenge in the Supreme Court will ironically convey the unmistakable message that this Congress actually doubts (rather than believes in) the constitutionality of such laws, that I would urge this Committee to support no legislation of this kind. Nor is it merely because, in withdrawing such possibilities of constitutional challenge only from the Supreme Court (or from the inferior federal courts as well) that a chaos of constitutional uncertainty must then be the general result (with eleven federal courts of appeal reaching diverse outcomes on the identical constitutional issue raised by identical laws, or fifty state supreme courts holding, in identical cases, that in State #1, the fourteenth amendment is violated, in State #3 it is not violated, in State #27 it is violated, though of course it is all the same fourteenth amendment to the same national Constitution). Without doubt it is true that selective uses of the exceptions clause may belittle the Constitution by yielding nonuniform and irreconcilable "interpretations" which, like bus transfers, change color as one crosses a state line. And without doubt there are immense practical reasons (considerations with respect to the interpretation of federal statutes quite apart from their constitutionality, that are virtually insurmountable) for not proceeding in this fashion. But the best reason here, in Congress, is that this Congress ought itself not welcome a fragmented Constitution of the United States of no national supremacy at all, but merely a ludicrous document of vagrant "meanings" unreviewably determined by state courts, many of which are subject to political control and possessed of no particular institutional independence.

When, therefore, decisions by the Supreme Court have been popularly perceived as so far "wrong" or intolerable that the constitutional constructions they have represented would not be tolerated (even as in the Dred Scott [the slavery] case), Congress has sought their correction by the means contemplated properly by the Constitution itself -- by an amendment which, ratified, then yields a single and uniform constitutional rule for the nation, just as the constitutional rule it replaced. And at the margin, this Congress (with the President) significantly also influences the interpretations reached by the Supreme Court through its participation in the appointment process where, to be sure, the "interpretative" predilections of nominees are fair game for your votes. But here, too, the change in the subsequent interpretation of the Constitution by the Supreme court itself, reflecting the influence of the appointment process itself, is one of a uniform Constitution as thus construed.

In 1868, when Congress last (albeit ultimately without success) attempted this anti-judicial use of the "exceptions" clause, it was done over the strongly phrased veto message by the President whom the Congress was even then attempting to impeach and to remove from office. The following passage from that message of veto is an appropriate way of closing my own testimony:

> The legislation proposed [to foreclose constitutional review in the Supreme Court] is not in harmony with the spirit and intention of the Constitution. It cannot fail to affect most injuriously the just equipose of our system of government; for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation. Thus far during the existence of the Government the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into or mistaken for an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences.
>
> Message of Veto, President
> Andrew Johnson, CONG. GLOBE,
> 40th Cong., 2d Sess. 2165 (1868).

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Senator HATCH. We are also happy to welcome to the witness table Mr. Lloyd N. Cutler, a senior partner in the prestigious Washington law firm of Wilmer, Cutler & Pickering.

For the last 2 years, Mr. Cutler has served as counsel to President Carter where he undoubtedly saw these constitutional issues from a slightly different vantage point—the heights of the executive branch.

In addition, Mr. Cutler served in various other influential capacities, including a member of the American Law Institute Council.

We are happy to have you here today, Lloyd, and we look forward to hearing your viewpoint.

After you have testified, our final witness will be Prof. Charles Rice from the University of Notre Dame Law School.

Professor Rice has written several books and articles on constitutional law. He is also the editor of the American Journal of Jurisprudence.

We particularly appreciate the contributions and the scholarly positions that Professor Rice has taken and made in this area of the law. We are looking forward to his testimony as well.

Charlie, we are happy to have you here as well today, and we look forward to hearing from you.

I do have a problem. We have been trying to limit our witnesses to 10 minutes. Thus far, it is amazing to me that the two law professors have done that thus far this morning.

If you could, we would like you to also. Your complete statements will be put in the record at the completion of your oral presentation.

Mr. Cutler?

## STATEMENT OF LLOYD N. CUTLER, ATTORNEY AT LAW, WILMER, CUTLER, AND PICKERING, WASHINGTON, D.C.

Mr. CUTLER. Thank you very much, Mr. Chairman.

I do not have the expertise of the witnesses you have heard in this field of the power of the Congress to control the jurisdiction of the Federal courts.

Senator HATCH. I am not sure that humility becomes you. [Laughter.]

I have seen very few things you have not had a lot of expertise on.

Mr. CUTLER. I was about to take back my humility.

I have argued several constitutional cases in the Supreme Court, including one relating to the original jurisdiction of the Court.

I have read through the other statements. I find a great deal in them with which I agree.

My conclusions, essentially, are that these bills, to the extent that they would deprive all the Federal courts—both the Supreme Court and the lower Federal courts—of jurisdiction to pass on particular constitutional issues, remitting such issues solely to the courts of the States, are unconstitutional.

In addition to being unconstitutional, they are highly undesirable from the standpoint of the Congress itself.

The arguments in support of that position, I think, have been set out by a number of the other witnesses. I will not try to repeat the reasoning.

The essence of the constitutional problem, I think, can best be illustrated by the reference in article III to one Supreme Court; and the absolute practical need for uniform interpretations of both the Federal Constitution itself and the Federal statutes.

Let me put to you, for example, what the situation would be under these very bills if, let us say, the Supreme Court of California were to rule that some parts of these bills—for example, the definition of a person for purposes of the 14th amendment—violated the Federal Constitution. It is its duty, of course, as a State supreme court to interpret and uphold the Federal Constitution. Suppose further that some other State supreme court upheld the provision. Yet you have cut off any kind of Supreme Court review.

That would be, as Professor Hart said in his famous article, not only constitutionally intolerable but it would be politically intolerable.

Similarly, there are many situations in which the State courts, although they have the power and duty to interpret and uphold the Federal Constitution, might be powerless to act. For example, it has been doctrine for a long time that a State court cannot enjoin a Federal officer.

There will be many Federal statutes dealing with the subject matter of these various bills—abortion, busing, school prayer, and similar topics.

If the constitutionality of one of those bills or laws comes into question and only the State courts are able to restrain a Federal officer from, let us say, carrying out one of those bills in a way that the State court feels violates the Federal Constitution the State court might well be powerless to enjoin the Federal officer.

It seems to me that both for constitutional reasons and for political reasons, it is illegal and extremely unwise for the Congress, even assuming it could—and I do not think it could—to deprive the Nation of the value of one Supreme Court that can promulgate uniform interpretations of the Federal Constitution and Federal statutes and have its orders run against Federal officers.

With repect to the provisions of these bills, or some of them, that would limit the jurisdiction of the lower Federal courts alone, it seems to me that is quite a different question. It may very well be within the power of the Congress to eliminate, not only the lower Federal courts but particular parts of the jurisdiction of the lower Federal courts, leaving those issues to come up through the State court system with ultimate review by the Supreme Court of the United States.

Once again, though, I think that is extremely impractical. We all know how overworked the Supreme Court already is.

The Supreme Court is greatly aided as an interpreter of the Constitution and in doing its work by the fact that most constitutional issues, particularly involving Federal statutes, but even those involving State statutes, come up through the Federal court system. They are handled by Federal judges experienced in the interpretaton of the Federal Constitution. They are filtered through 12 regional courts of appeals. Those judges and that system are able to apply to other cases the principles which the Supreme Court rarely enunciates—because there are relatively few Supreme Court constitutional decisions.

If, however, the Supreme Court had to review cases from 50 different State courts, issued for the most part by judges not experienced in construing the Federal Constitution, all of those efficiencies would be lost.

Moreover, the Supreme Court has said on a number of occasions that there are particular circumstances in which a State remedy would be inadequate.

I refer you, in particular, to the cases—and these bills would cover them—where what we are dealing with is a Federal statute being carried out by a Federal officer. It may be beyond the power of the State court to enjoin the enforcement of such statutes.

On the third issue, the issue relating to busing, it seems to me that while the Congress may very well have the power to limit the remedies that can be granted—certainly by the lower Federal courts—we have a square decision of the Supreme Court in *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43 (1971), that a State denial of busing, as a remedy for an adjudicated violation of the Constitution, itself violates the 14th amendment.

If that is true, I do not see how a Federal congressional denial of the busing remedy, in any and all circumstances where there is an adjudicated violation of constitutional rights and the court believes that busing is the only method of resolving the problem, could itself be constitutional.

I will stop there.

[The prepared statement of Mr. Cutler follows:]

# PREPARED STATEMENT OF LLOYD N. CUTLER

Mr. Chairman and Members of the Committee:

I appear here today at the Subcommittee's invitation to testify concerning the constitutionality of proposed congressional limitations on the jurisdiction of the federal judiciary. As a lawyer, I find several constitutional difficulties in the legislation now pending in Congress that would curtail federal court jurisdiction. For purposes of my statement, I shall first discuss the constitutional barriers to eliminating all federal court jurisdiction over cases arising under certain constitutional provisions. I then will discuss the problems with respect limiting the jurisdiction of the lower federal courts alone. I will conclude with my views concerning the constitutionality of limitations on busing, as they raise somewhat different constitutional questions than the proposed legislation affecting abortion, prayer, and sex discrimination in the military.

## I. Limitations on the Jurisdiction of all Federal Courts

Several of the pending bills would curtail the original and appellate jurisdiction of all federal courts to hear and decide cases involving specific constitutional rights. See S. 481; H.R. 72; H.R. 326; H.R. 408; H.R. 865; H.R. 867; H.R. 869; H.R. 989; H.R. 1335. I believe that any such curtailment would violate Article III of the Constitution.

Section 1 of Article III creates the Federal Judiciary as one of the three separate and independent branches of our government. It then provides that the "judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 defines "the judicial power" to include in part "all Cases, in Law and Equity, arising under this Constitution." Article III makes no exception whatever to the judicial power created in Section 2 and vested in Section 1 in the federal judiciary as a whole.

Section 2 of Article III does, of course, give Congress the power to regulate or make "exceptions" to the appellate jurisdiction of the Supreme Court. Moreover, the language of Section 1 gives Congress broad power to create or abolish lower federal courts and define their jurisdiction. Like other constitutional powers, however, these powers of Congress are not absolute. They are limited in part by Article III itself. Under Article III, there must be a Supreme Court. The Supreme Court together with whatever lower courts Congress may create, must exercise the full judicial power of the United States. Congress has a large say as to which federal courts exercise this judicial power, but Congress cannot remove any part of this power from all federal courts. Mr. Justice Story interpreted the "obligatory force" of the language of Article III to require not only that there be a Supreme Court with some essential core of judicial power, but also that the "whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under [Congress'] authority." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304

(1816). See Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1940), reversed on other grounds, sub nom., Johnson v. Eisentrager, 339 U.S. 763 (1950).

To date, there fortunately has been no occasion for a definitive decision whether Congress could legislate away the reach of the judicial power of the United States to all cases arising under the Constitution, because Congress never has attempted to do so. To be sure, in Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868), the Supreme Court acknowledged the power of Congress to take away the right of direct appeal from the circuit courts to the Supreme Court that it had previously granted under a Reconstruction habeas corpus statute. This Congressional withdrawal of direct appellate jurisdiction from the Supreme Court, however, merely structured the way in which claims of unconstitutional confinement were to be brought before the federal courts -- it did not remove habeas corpus claims from the judicial power of the United States. Moreover, as the Supreme Court noted in Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869), decided after Ex parte McCardle, Congress had left intact the Supreme Court's discretionary power to review lower court decisions by writ of habeas corpus under the statutory authority given it in the Judiciary Act of 1789. Some Justices have questioned whether even the narrow decision of McCardle was correct. See Glidden v. Zdanok, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

Habeas corpus, of course, may have a special immunity against congressional restriction because it is expressly guaranteed under Article I, Section 9. But the same reasoning has been followed as to other cases arising under the Constitution. In Yakus v. United States, 321 U.S. 414 (1944), the Supreme Court upheld a provision in the Emergency Price Control Act of 1942 that denied the Court appellate jurisdiction, in hearing appeals from criminal convictions for violations of the regulations promulgated under the Act, to review the constitutionality of those regulations. But the jurisdictional regulation at issue in Yakus, like that in McCardle, did not purport to bar the Supreme Court from ever reviewing the constitutional claims involved. Rather, it merely required that constitutional challenges to price regulations be brought before the Court via appeals from the Emergency Court of Appeals that Congress had created for the purpose of hearing such challenges. The Court has held many times that there is a constitutional right to judicial review of agency actions, at least where jurisdictional or constitutional claims are raised.

Many of the bills now pending in Congress, however, would go well beyond the minimal congressional regulation of federal court jurisdiction considered in Ex parte McCardle and Yakus. In these cases Congress regulated only the path of judicial review, not the right of judicial review itself. Some of the present bills would appear to extinguish the federal judicial power altogether, insofar as it extends to cases arising under certain constitutional provisions. If given this effect in application, the bills would prevent the federal judiciary from serving its essential constitutional role of deciding or reviewing cases arising under the Constitution. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816);

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). There no longer would be any federal judicial review whatever of certain constitutional matters. As Professors Hart and Wechsler concluded in their famous dialogue of a quarter of a century ago, that would be incompatible with the Constitution's basic scheme of checks and balances.

If Congress can bar all judicial review of its own actions and those of the states, where would such a theory stop? Could Congress suspend some or all of the Bill of Rights -- such as freedom of speech or equal protection under the law -- and at the same time bar the federal courts from considering the constitutionality of the suspension? The question answers itself.

## II. Limitations on the Jurisdiction of the Lower Federal Courts Alone

A few of the bills now pending in Congress would eliminate only the jurisdiction of lower federal courts to consider cases arising under certain provisions of the Constitution or to order certain forms of relief in such cases. See S. 158; S. 583; H.R. 73; H.R. 900. On its face, this approach appears to be consistent with the requirement of Article III that all federal judicial power be vested in either the Supreme Court or in the lower federal courts, provided that individuals could still assert their claimed constitutional rights in the state courts and seek federal judicial review by appealing to the Supreme Court. I believe that even this more limited regulation of federal court jurisdiction nevertheless raises potential practical and constitutional difficulties.

First as to the practical difficulty. As we all know, the Supreme Court's ability effectively to review appeals from lower federal and state courts already is severely taxed. The need to do so is reduced by funnelling all federal cases through twelve regional courts of appeals, and by the ability of federal judges, experienced in federal constitutional matters, to apply to all their cases the guidelines offered by the Supreme Court in the very few constitutional opinions it issues.

If broad classes of constitutional cases were now to originate in the state courts rather than in the lower federal courts, these efficiencies would be lost. State court judges are less experienced in federal constitutional issues. Instead of twelve regional courts of appeals to take much of the load from the Supreme Court, the Supreme Court would have to review directly a much larger number of decisions made by the courts of 50 states.

Apart from the heavy additional burden that would be placed on the Supreme Court if Congress curtailed the jurisdiction of the lower federal courts, there may also be several constitutional problems. In _Battaglia v. General Motors Corp._, 169 F.2d 254, 257 (2d Cir.) _cert. denied_, 335 U.S. 887 (1948), the court ruled that Congressional power under Article III to remove certain cases from the courts is limited by the Due Process restrictions of the Fifth Amendment.

In some cases, relegating a constitutional claimant to state remedies, with only an ultimate appeal to the Supreme Court, may infringe on a constitutional right. In _Dombrowski v. Pfister_, 380 U.S. 479 (1965), the Supreme Court upheld a lower federal court's jurisdiction to enjoin a state criminal proceeding because it found that under the circumstances there present the threat of state court criminal action could deprive the litigant of his constitutional rights, and state court proceedings would not "assure adequate vindication of constitutional rights." Similarly, in Feiner v. Boykin, 271 U.S. 240, 243-44 (1926), and in Younger v. Harris, 401 U.S. 37 (1971), the Court explicitly assumed that in some cases individual constitutional rights infringed by state action could not be adequately protected except by recourse to the lower federal courts.

Indeed, prior congressional limitations on federal court jurisdiction have long recognized the need for federal courts as enforcers of constitutional rights, and have provided for it. Shortly after the Civil War, Congress enacted § 1983 and the Fourteenth Amendment specifically because it found it necessary "to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law." Mitchum v. Foster, 407 U.S. 225 (1972). Thus, although 28 U.S.C. § 2283 generally deprives the lower federal courts of the power to enjoin pending state proceedings, it does not apply to actions brought under § 1983 to protect individuals' constitutional liberties from deprivation under color of state law, because § 1983 is a "uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." Id.

Conceivably these arguments could be met, where state court proceedings are already in progress, by the right to seek interlocutory protection from the Supreme Court under the All Writs Act, but this in turn would place an enormous added burden on the Supreme Court and be open to the same practical objection made above. In at least some cases, denying litigants access to the lower federal courts for redress of their constitutional grievances is tantamount to denying the litigants their constitutional rights, for state court alternatives simply are not always available and adequate.

Quite apart from the potential inadequacy of state court relief, there is a second constitutional barrier to the regulation of lower federal court jurisdiction proposed in these bills. Even if lower federal court jurisdiction over all cases arising under the Constitution could be curtailed, Congress may not constitutionally single out for exemption from federal court jurisdiction the two or three specific areas where Congress disagrees with particular court decisions. There can be little doubt that these bills never would have been drafted if the Court had not interpreted the Constitution to protect women's rights to choose abortions (in certain circumstances) and children's rights to be free from prayer in public schools and to attend public schools with other students chosen in non-discriminatory ways. These bills are an attempt by Congress to review and reverse specific Supreme Court decisions that Congress finds objectionable.

The Supreme Court in the past has found that such congressional attempts to interfere with its decisionmaking violated Article III. Thus, in United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), the Court held that a congressional attempt to prescribe a rule of decision in order to make a case come out in a particular way was unconstitutional, even though the statute was phrased in terms of a limitation of the courts' jurisdiction:

> "Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." Id. at 147.

Similarly, in Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868), the Supreme Court distinguished the congressional regulation of the Court's appellate jurisdiction at issue in that case from cases in which courts had struck down "the exercise of judicial power by the legislature, or of legislative interference with the courts in the exercising of continuing jurisdiction." Id. at 514 (emphasis added).

Indeed, if taken to the extreme, such expansion of congressional power through the use of selective jurisdictional statutes could destroy the balance of constitutional authority among our three branches of government. It would be even more pernicious than the Court-packing bill that Congress rightly rejected in 1937. Former Attorney General Rogers made this very point in objecting to a similar bill in 1958. See Proposed Limitation of Appellate Jurisdiction of the Supreme Court: Hearings on S. 2646 Before the Subcomm.

To Investigate the Internal Security Act and Other Internal Security Affairs of the Senate Comm. on Judiciary, 85th Cong., 2d Sess. 573 (1958) (letter of William P. Rogers).

Moreover, the discrimination that these bills represent runs contrary to the political theory and spirit underlying our entire constitutional structure. As Chief Justice Stone observed in the famous footnote four of his opinion in United States v. Carolene Products Co., 304 U.S. 144 (1938), the political process can be trusted to weed out "undesirable legislation" that affects a broad cross-section of the populace. The same is not true, however, of legislation aimed at what Chief Justice Stone called "discrete and insular minorities." This is why the Bill of Rights removes from majoritarian politics decisions directly and explicitly affecting such minorities. In the place of the normal majority rule, Article V places a constitutional amendment process that requires a two-thirds vote of both Houses of Congress and the concurrence of three-fourths of the states. The bills pending before Congress, however, would seek to circumvent this constitutional process by legislating explicitly against those "discrete and insular minorities" whom the Supreme Court has held protected by the Bill of Rights.

They may well violate Equal Protection, insofar as they would disadvantage some constitutional claimants according to their race, sex, or other invidious distinctions. This seems particularly true with respect to those bills dealing with school desegregation remedies and suits involving sex discrimination.

## III. Congressional Regulation of Busing

Finally, several of the bills before the Subcommittee would directly prohibit courts from entering busing orders in school desegregation cases. Such interference in my view would be unconstitutional, at least when the Court finds that a busing remedy is necessary to correct an adjudicated violation of constitutional rights.

Busing, of course, is a remedy that federal courts order to correct past unconstitutional discrimination in schooling; it is not a constitutional right in itself. The busing jurisdiction bills therefore differ from the other bills in that they purport to limit only the relief that federal courts could give for certain constitutional violations-- not the courts' ability to decide whether there was such a violation.

But the Supreme Court has ruled that, as a practical matter, busing may be the only remedy that will correct certain violations of the Fourteenth Amendment. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971). Thus, frustration or denial of court-ordered remedies for school desegregation cannot be distinguished from frustration or denial of the underlying Fourteenth Amendment right. See Cooper v. Aaron, 358 U.S. 1, 17 (1958); Griffin v. School Board of Prince Edward County, 377 U.S. 218, 232 (1964). Indeed, in North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971), the Supreme Court struck down a state statute imposing "an absolute prohibition" on involuntary busing of any student on grounds of race or to bring about racial balance. The Court said that this ban "would inescapably operate to obstruct the remedies granted" in the Charlotte-Mecklenburg case, and noted that because "bus transportation has long been an integral part of all public educational systems, . . . it is unlikely that a truly effective remedy could be devised without continued reliance upon it." (402 U.S. at 46.) If a state anti-busing statute violates the Fourteenth Amendment "when it operates to hinder vindication of federal constitutional guarantees," it is difficult to conclude that a congressional statute achieving the same result could possibly be constitutional.

Senator HATCH. Thank you.

Professor Rice?

## STATEMENT OF CHARLES E. RICE, PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME

Dr. RICE. Thank you, Mr. Chairman.

Rather than read the entire statement, I would like to insert it in the record and then just comment on a few points in connection with it and then open it up to discussion and questions.

Senator HATCH. The full statement will be included in the hearing record at the completion of your oral presentation.

Dr. RICE. I agree that the issue here really goes to the wisdom of Congress rather than to the power of Congress.

It seems quite clear that article III, section 2, means what it says in giving the exceptions power to the Congress to control the appellate jurisdiction of the Supreme Court.

As Alexander Hamilton observed in the Federalist, No. 81:

> The Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, both subject to any exceptions and regulations which may be thought advisable.

If we go through—and I do not propose to do it here in these spoken remarks—the precedents as has been done in the statements of the other witnesses, we will see that the notion that the congressional power to limit the appellate jurisdiction of the Supreme Court is itself limited, is merely an academic creation. It has no support in the statements of the framers, and it has no support in cases decided by the Supreme Court or in statements by Supreme Court Justices.

The power of Congress was considered for a considerable time by the Supreme Court to be so broad that a specific authorization by Congress of appellate jurisdiction was construed by the court to imply that such jurisdiction was excluded in all other cases.

This was the negative pregnant doctrine which was enunciated by Chief Justice Marshall in *U.S.* v. *More.*

Following this, it was not until 1891 that criminal cases were appealable to the Supreme Court, simply because until then Congress had not specified that they could be so appealed.

The only way they could be brought to the court was by a certificate of division of opinion in the circuit court upon questions of law.

Rather than recite various other things, let me go to a couple of problems that arise on this.

We are talking about the possibility of legislation taking away jurisdiction from the court in particular areas, such as reapportionment, abortion, school busing, school prayer, or whatever it might be.

The precedents—actual decided cases—are rather slim. There are few. The *McCardle* case, of course, is the one that is most prominently cited.

*McCardle* did not, it should be noted, take away all of the habeas corpus jurisdiction of the Supreme Court. It took away the jurisdiction conferred only by the 1867 act.

It left untouched as the *Yeagler* case pointed out in the following year, the prior jurisdiction which the Supreme Court had to issue writs of habeas corpus under the 1789 act.

*McCardle* itself is a limited precedent.

The *Klein* case, 4 years later in 1872, is the only decision ever to strike down a statute enacted under the exceptions clause. The statute there attempted to dictate a rule of evidence to the court with respect to the effect of a pardon. The statute provided that whenever it appears that a judgment of the Court of Claims has been founded on a Presidential pardon without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case.

It said that every pardon granted to a suitor in the Court of Claims which recited that he has been guilty of any act of rebellion shall, if accepted by him, be taken as conclusive evidence of such act of rebellion or disloyalty.

There are two problems with the statute in the *Klein* case. One was that it took away, or interfered with, the evidentiary process in the court itself. It was an interference in the internal workings and the internal mental operation of the court in deciding a case.

The second was that it intruded upon the President's pardoning power by attempting to deny to such a pardon the effect which it clearly has.

Significantly, for our purpose, the *Klein* case indicated quite clearly, as the court said, that if the statute simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make such exceptions and regulations, and so forth.

You will not find anything in *Klein* or *McCardle* or in any other case to indicate that Congress cannot take away appellate jurisdiction from the court in the kinds of cases that we are talking about.

We are dealing with a question of wisdom. I would like to address very briefly that question in terms of whether it could be desirable to do that.

You have, of course, the problem that is raised of the supposed necessity for a uniform interpretation of constitutional rights and the necessity for there to be a single court which would pass judgment on such issues of constitutional rights.

The problem here is that we have a specific provision in the Constitution, article III, section 2, which gives to Congress the power to make exceptions and leads to the conclusion that there is no constitutional right to such uniformity of interpretation in cases were Congress has made such exception.

There is nothing in any of the court decisions or any of the legislative history to qualify that power of Congress. You find academic conjectures, and I sympathize with them. But they do not change the reality of the congressional power.

It is true, as Professor Hart points out, that there would be grave problems with a statute which interfered with the essential role of the Supreme Court. He was talking there about the supposition that a statute took away all of the appellate jurisdiction of the Supreme Court except, for example, for patent cases.

If Congress were to enact a wholesale obliteration of the appellate jurisdiction of the court, I suggest you would have a different problem. You would no longer be talking about an exception; you would be talking about just that—a wholesale obliteration which would raise a very serious question of the interference with the essential role of the Supreme Court.

We are not talking about that. We are talking, or at least I am talking, about the power of Congress to enact narrowly conceived and narrowly drawn exceptions to the appellate jurisdiction of the court in a particular class of cases—one, two, three, four, or whatever.

As to that narrowly defined issue, it is quite clear that Congress does have the power.

A further consideration is that we are talking about Supreme Court decisions which, assuming there is enough opposition in Congress to enact an exception to the court's jurisdiction, are very unpopular decisions and which are conceived by the Congress to be virtually usurpations. We are talking about very serious cases.

The alternative remedies for such decisions are to attempt to amend the Constitution or to use this much more limited device of taking away the appellate jurisdiction of the court.

It seems to me that the course of prudence in this area is to avoid tampering with the Constitution, except as it is absolutely necessary, and to choose instead, whenever possible, the much more limited device of withdrawing the jurisdiction from the court.

In a sense, in these cases where it is the conviction of Congress that you have a usurpation of power by the court, the court defining its own concept of fundamental rights as with the right of privacy, and then expanding and inflating those rights far beyond what the Constitution ever intended, when you have such usurpations and Congress comes in with a surgical device rather than with a sledgehammer and takes particular areas out of the court's jurisdiction, you have a cooling off period. You have an opportunity to go back to what the Framers evidently originally intended to be the device for deciding constitutional cases—the State courts, in the first instance.

You have a lack of uniformity for a time, but it is subject to this. You have not amended the Constitution. You have simply enacted a statute.

Any time that that statute begins to create problems, you can always restore the jurisdiction of the Supreme Court.

This device is clearly within the power of Congress to remove what Alexander Hamilton called the inconveniences which might arise from the exercise of the judicial power. And I regard it as prudentially advisable for various reasons in such serious cases.

It could teach the court a lesson, where it is desired to do so. It could do so without tampering with the very basic structure of the Constitution.

That is all I would like to say orally, except to apologize for my laryngitis.

Senator HATCH. We understand that.

I have to be at Senator Baker's office. I would like to have some questions asked, so I am going to ask my staff to ask the questions and get your responses on the record.

I would like you to just ask one or two questions of each of them.

We will leave the record open for any other colleague to submit written questions.

I have been intrigued with this issue.

Of course, in the testimony yesterday and today, it set a wide variance, as you can imagine. I think it has been very worthwhile to hold these hearings.

We appreciate the effort you have put forth.

With that, I had better leave to see Senator Baker. My staff member will ask the questions.

Thank you so much.

[The prepared statement of Professor Rice follows:]

## PREPARED STATEMENT OF PROF. CHARLES E. RICE

The subject of this hearing is the general one of the power of Congress over the jurisdiction of the federal courts, including particularly the appellate jurisdiction of the Supreme Court.

There is no question but that Congress has the power to define entirely the jurisdiction of lower federal courts. [Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850); Lockerty v. Phillips, 319 U.S. 182, 187 (1943)] The more interesting issue, however, is whether Congress has the power to withdraw a particular subject, such as abortion, voluntary school prayer, or whatever, from the appellate jurisdiction of the Supreme Court. The Exceptions Clause of Article III, Section 2, which provides that "the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make" was intended, according to Alexander Hamilton, to give "the national legislature...ample authority to make such _exceptions_, and to prescribe such regulations as will be calculated to obviate or remove" the "inconveniences" which might arise from the powers given in the Constitution to the federal judiciary. [The Federalist, No. 80 (emphasis in original)] There was evidently concern in the Constitutional Convention and in some of the ratifying conventions that the Supreme Court would exercise appellate power to reverse jury verdicts on issues of fact. Nevertheless, the language of Article III, Section 2 explicitly gives the Supreme Court "appellate Jurisdiction, both as to Law and Fact." And it is evident that the power of Congress to make exceptions to that appellate jurisdiction extends to the Court's power to review questions of law as well as questions of fact. As Alexander Hamilton observed in The Federalist, No. 81, "the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, both subject to any _exceptions_ and _regulations_ which may be thought advisable." (Emphasis in original)

This power of Congress was so broadly interpreted that a specific authorization by Congress of appellate jurisdiction was construed by the Supreme Court to imply that such jurisdiction was excluded in all other cases. This "negative pregnant" doctrine was enunciated by Chief Justice John Marshall in U.S. v. More, in which the Court held that it had no criminal appellate jurisdiction because none had been expressly stated by Congress. Marshall, speaking for the Court, said

> ...an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described. [7 U.S. (3 Cranch) 159, 172 (1805)]

It is interesting to note that no criminal cases were appealable to the Supreme Court until 1891, simply because until then Congress had not specified that they could be so appealed. The only way a criminal case could be brought to the Supreme Court was "by certificate of division of opinion" in the Circuit Court "upon specific questions of law." [U.S. v. Sanges, 144 U.S. 310, 319 (1892); see also U.S. v. Cross, 145 U.S. 571 (1892) Ex parte Bigelow, 113 U.S. 328, 329 (1885).]

In 1810, in Durousseau v. U.S. [10 U.S. (6 Cranch) 307, 313 (1810)], Chief Justice Marshall emphasized that the Court is bound even by implied exceptions to its appellate jurisdiction, so that, in effect, it can exercise it only where expressly granted by Congress." The Congress, he said, "have not declared, that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative in the exercise of such appellate power as is not comprehended within it." When Chief Justice Taney spoke to the issue in Barry v. Mercein, he said, "By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes." [46 U.S. (5 How.) 103, 119 (1847)]

Prior to 1868, the Supreme Court never had to decide the validity of an act of Congress making a specific exception to its appellate jurisdiction. But when McCardle, a Mississippi editor, was imprisoned by the federal reconstruction authorities on account of statements he had made, he sought a writ of habeas corpus from the federal circuit court, asking that court to rule that his detention was invalid. When this petition was denied he appealed to the Supreme Court under a statute specifically permitting such appeals. After the Supreme Court heard arguments on the case and while the Court was deliberating, Congress enacted a statute repealing that part of the prior statute which had given the Supreme Court jurisdiction to hear such appeals from the circuit court. The Court, in confronting for the first time the issue of the positive congressional exception to the appellate jurisdiction, dismissed the petition for want of jurisdiction, even though the case had already been argued and was before the Court. "We are not at liberty to inquire into the motives of the legislature," said the Court. "We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words...without jurisdiction the court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case. And this is not less clear upon authority than upon principle."

It is true that the 1868 statute upheld in McCardle did not bar the Supreme Court from reviewing all habeas corpus cases. Rather, it only barred review sought under the 1867 statute which had provided an avenue of review of such cases from the circuit court. The Supreme Court retained the habeas corpus review power which had been given it by the Judiciary Act of 1789 and which Congress had chosen not to withdraw. Later in 1868, the Court applied this distinction in Ex parte Yerger [75 U.S. (8 Wall.) 85 (1868)], where the Court held that the 1868 statute left untouched the Supreme Court's power to issue its own writ of habeas corpus to a lower court as provided in the Judiciary Act of 1789. But neither in McCardle nor in Yerger is there any indication whatever that the Court would not have upheld an act withdrawing appellate jurisdiction in all habeas corpus cases from the Court.

Four years later, in U.S. v. Klein [80 U.S. (13 Wall.) 128, 145-46 (1872)] the Court had occasion to spell out one important limitation of the Exceptions Clause. Klein is the only Supreme Court decision ever to strike down a statute enacted under the Exceptions Clause. The claimant in Klein, who had been a Confederate, sued in the Court of Claims to recover the proceeds from the sale of his property seized and sold by the Union forces. He had received a full presidential pardon for his Confederate activities, and the Court of Claims ruled in his favor for that reason. If he had not received a pardon, the governing statute would have prevented his recovery. While the appeal of his case was pending before the Supreme Court, a statute was enacted which provided that, whenever it appears that a judgment of the Court of Claims has been founded on such presidential pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case. The statute further declared that every pardon granted to a suitor in the Court of Claims which recited that he has been guilty of any act of rebellion or disloyalty, shall, if accepted by him in writing without disclaimer of those recitals, be taken as conclusive evidence of such act of rebellion or disloyalty and his suit shall be dismissed. While declaring the statute unconstitutional, the Supreme Court expressly reiterated that Congress does have the power to deny appellate jurisdiction "in a particular class of cases":

> Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right to appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exer-

> cise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient. (Emphasis added)

The statute in Klein attempted to dictate to the Court how and by what processes it should decide the outcome of a particular class of cases under the guise of limiting its jurisdiction. The Court lost jurisdiction only when the Court of Claims judgment was founded on a particular type of evidence, that is, a pardon. And the statute further prescribed that the effect of the pardon would be such that the recitals in the pardon of acts of rebellion and disloyalty would be conclusive proof of those acts. "What is this," said the Court, "but to prescribe a rule for the decision of a cause in a particular way?" It is difficult to imagine a more flagrant intrusion upon the judicial process than this effort to dictate the rules to be used in deciding cases. Moreover, the statute in Klein intruded upon the President's pardoning power by attempting "to deny to pardons granted by the President the effect which this court had adjudged them to have." In these major respects the statute involved in Klein was wholly different from a statute simply withdrawing appellate jurisdiction over a certain class of cases.

Since the Klein case, the Supreme Court has not had occasion to define further any limits to the Exceptions Clause. In the Francis Wright case [105 U.S. 381, 386 (1881)], the Court said that what the "appellate powers" of the Supreme Court "shall be" and "to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not." Chief Justice Waite, in his opinion for the Court in Francis Wright, referred to "the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe." [105 U.S. at 385 (emphasis added)] Several statements of individual justices in the intervening years reinforce this conclusion. Thus Justice Frankfurter, in his dissenting opinion in National Insurance Co. v. Tidewater Co. [337 U.S. 582, 655 (1949)] noted that "Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is sub judice. Ex parte McCardle, 7 Wall. 506." [See also the opinion of Justice Harlan in Glidden v. Zdanok, 370 U.S. 567-68 (1962); and see the concurring opinion of Justice Douglas in Flast v. Cohen (392 U.S. 83, 109 (1968)], stating that "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Art. III. See Ex parte Mccardle, 7 Wall. 506."

In summary, the holdings of the Supreme Court and the statements of various individual justices compel the conclusion that Congress clearly has power under the Exceptions Clause to withdraw appellate jurisdiction from the Supreme Court in particular classes of cases. Indeed, this power is so strong that an exception will be implied in cases where Congress has not specifically "granted" appellate jurisdiction to the Court.

It will be useful here to mention some arguments that have been advanced against the use of the exception power by Congress. It has been urged, as Professor Henry Hart put it, that the exceptions "must not be such as to destroy the essential role of the Supreme Court in the constitutional plan." [Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953)] In addition to the difficulty of determining what is the Supreme Court's "essential role," that test would make the Court itself the final arbiter as to the extent of its powers. Despite the clear grant of power to Congress in the Exceptions Clause, no statute could deprive the Court of its "essential role"; but that role would be whatever the Court said it was. It is hardly in keeping with the spirit of checks and balances to read such a virtually unlimited power into the Constitution. If the Framers intended so to permit the Supreme Court to define its own jurisdiction even against the will of Congress, it is fair to say that they would have made that intention explicit.

Furthermore, the "essential role" test was advanced by Professor Hart in response to the suggestion that Congress could satisfy the Exceptions Clause by removing all but a "residuum of jurisdiction," for example, by withdrawing appellate jurisdiction in "everything but patent cases." Whatever the cogency of Professor Hart's "essential role" test would be to a wholesale withdrawal of jurisdiction, if it were ever attempted by Congress, his test cannot properly be applied to narrowly drawn withdrawals of jurisdiction over particular types of cases. It could hardly be argued that the "essential role" of the Supreme Court depends on its exercising appellate jurisdiction in every type of case involving constitutional rights. Such a contention would be contrary to the clear language of the Exceptions Clause and to the consistent indications given by the Supreme Court itself.

A related but more substantial argument against the exercise of Congress' Exceptions Clause power is that Supreme Court review of cases involving important constitutional rights is necessary to ensure uniformity of interpretation and the supremacy of federal statutes over state laws.

The argument that fundamental rights should not be allowed to vary from state to state begs the question of whether there is a fundamental right to uniformity of interpretation by the Supreme Court on every issue involving fundamental rights. The argument overlooks the fact that the Exceptions Clause is itself part of the Constitution. As Alexander Hamilton wrote in No. 80 of the Federalist, the Exceptions Clause is a salutary means "to obviate and remove" the "inconveniences" resulting from the exercise of the federal judicial power. Judging from what the Supreme Court has said about it over the years, it is not only an important element of the system of checks and balances, but one which grants a wide discretion to Congress in its exercise. There is, in short, a fundamental right to have the system of checks and balances maintained in working order. Without that system, the more dramatic personal rights, such as speech, privacy, free exercise of religion, would quickly be reduced to nullities. This right to a preservation of the system of checks and balances is itself one of our most important constitutional rights.

If it be contended that the Exceptions Clause cannot be used to deprive the Supreme Court of appellate jurisdiction in cases involving fundamental constitutional rights, it must be replied that such a limitation can be found neither in the language of the clause nor in its explications by the Supreme Court. Indeed, the Supreme Court's conclusion, prior to 1891, that there was no general right of appeal to that Court in criminal cases surely involved the denial of the right to appeal in cases involving constitutional rights. For what constitutional right is more fundamental than the Fifth Amendment right not to be deprived of life or liberty without due process of law?

The specious character of the argument that Congress cannot exercise its Exceptions Clause power in cases involving fundamental rights is shown, for example, in the school prayer matter. The Establishment Clause of the First Amendment was intended to reserve the issue of establishment of religion for decision by the states without federal interference. The constitutional right protected by the Establishment Clause is the right to have issues such as prayer in public school decided on a state-by-state basis. [See generally, Griswold, Absolute Is In the Dark, 8 Utah L. Rev. 167 (1963), Rice, The

Supreme Court and Public Prayer (Fordham University Press, 1964)]

Moreover, it is only through an historically indefensible interpretation of the Fourteenth Amendment that the Supreme Court has decreed that the states are strictly bound by the provisions of the Bill of Rights. [See Berger, Government by Judiciary (Harvard University Press, 1977), ch. 8] Until the adoption of the Fourteenth Amendment in ~~19~~1869, it was clear that the protections of the Bill of Rights bound only the federal government. [Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)].

The school prayer issue arises out of one judicial fiction piled upon another. The Fourteenth Amendment is interpreted, contrary to the intent of its framers, so as to bind the states strictly by the Supreme Court's conceptions of the First Amendment and then the First Amendment itself is interpreted in a manner that would shock its framers in the First Congress. Other areas, including abortion, legislative apportionment and certain aspects of criminal procedure, similarly involve "fundamental" rights which were beyond the imagination of the framers of the Constitution and the Fourteenth Amendment and which owe their recognition only to the more fertile imaginations of the justices of the Supreme Court.

The argument that the Supreme Court cannot be deprived of jurisdiction to hear appeals when they involve rights which the Court has itself created, is an exercise in bootstrap jurisprudence. It would make the Supreme Court not only supreme but absolute in some of the most sensitive areas of our constitutional life. Clearly, the Exceptions Clause was designed specifically to prevent such a result.

A final comment is in order on the practical effect of the withdrawal of Supreme Court and lower federal court jurisdiction. The school prayer issue will serve as an example. Unlike a constitutional amendment, such a withdrawal would not reverse the

Supreme Court's rulings on school prayer. Presumably, at least some state courts would strictly follow those decisions as the last authoritative Supreme Court expression on the subject. But there would at least be no opportunity for further extensions of its errors by the Court. And in cases where supporters of the school prayer decisions sought to extend them, for example, to outlaw chaplains in the armed forces, those state courts would be apt to show a greater measure of prudence than the Supreme Court has sometimes shown on the subject.

It may be expected, however, that some state courts would openly disregard the Supreme Court precedents and would decide in favor of school prayer once the prospect of reversal by the Supreme Court has been removed. But that result would not be such a terrible thing. It must be remembered that we are talking about Supreme Court decisions which, in the judgment of the elected representatives of the people and the President (or of 2/3 of the Congress overriding his veto), would appear so erroneous as to be virtually usurpations. It would be a healthful corrective of those decisions for the people to trust for a time in the state courts upon which the Framers of the Constitution primarily relied and to be protected against further excesses in that area on the part of the Court. In the process, the Court might learn a salutary lesson so that future excursions by the Court beyond its proper bounds would be avoided. Finally, because a statute rather than a constitutional amendment is involved, the Court's jurisdiction could readily be restored should the need for it become apparent.

In his First Inaugural Address, President Abraham Lincoln warned that "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal." Supreme Court decisions in several areas are distortions of the constitutional intent in matters of substantial importance. It is within the power -- and it is the duty -- of Congress, to remedy this wrong. The withdrawal of jurisdiction would be A measured and appropriate response. It would be preferable to a constitutional amendment in that it would have no permanent impact on the Constitution. If experience showed it to be unwise, it could be readily repealed by a statute. But it would restore the balance of governmental powers and help to undo some of the unfortunate consequences of judicial excess.

Mr. RADER. It is not very often you are promoted to Senator. [Laughter.]

I recently ran across a statement by a highly respected former chairman of this subcommittee. He had just heard an argument such as we heard yesterday in the subcommittee that the supremacy clause conflicts with the exceptions clause, because it demands that Federal law be permanent and the exceptions clause could lead to various interpretations in State courts.

Sam Ervin, that subcommittee chairman, replied that "it may be on point that the supremacy clause requiring State judges to take an oath to support the Constitution was to get uniformity out of diversity."

Should the supremacy clause be read as in conflict with the exceptions clause? Could the precedents cited yesterday in favor of uniformity of laws actually be read as satisfied by the supremacy clause.

Mr. Van Alstyne?

Dr. VAN ALSTYNE. I am not quite sure that I fully understand the question, although by chance I appeared in the hearings from which you have culled Sam Ervin's statements in 1968. That is the last time a committee of the Senate looked at the general issue we are dealing with.

There is no necessary conflict, precisely on the face of doing it for the reason that you culled from that 13-year-old record.

The supremacy clause does indeed come accompanied in article VI by the requirement that all State judges take an oath to uphold and defend the Constitution. It is implicit in the oath, therefore, that insofar as some State statute will strike them as conflicting with some provision in the Constitution, then they are bound by their oath of office to grant the supremacy due the document itself.

We do not operate on the presupposition that they will ignore their oath. Assuming they abide by their oath, according to their own best understanding as to what the Constitution requires, there is obviously no conflict, merely because there is no additional forum subsequently to second-guess or review the decision they make with regard to that question.

I am not sympathetic to a contrived effort to generate a false conflict of that kind.

At the same time, it is clearly the case that even the most scrupulous of State judges will not necessarily reach the same conclusions of law and constitutional law, even on identical facts.

That is self-evident. It is as self-evident as divisions in the Supreme Court itself. Indeed, the frequency of 5-to-4 decisions is manifest evidence that conscientious persons will disagree.

The problem, therefore, is more practical, in my opinion, than it is theoretical, so far as the supremacy clause is concerned.

Insofar as Congress may in some areas—although as a practical matter, it will not in all areas—foreclose Supreme Court review, it will also have to foreclose all lower Federal court review. It will indeed, if you are going to grant finality to the State supreme courts.

Indeed, if Congress does not, then we will get real chaos within a given State, because we will have mutually exclusive decisions on the merits of constitutional issues.

In cases of almost identical facts which no lawyer is able to distinguish and different outcomes within the same State, depending upon the accident of which court system the case started up in, you are not going to have differences among the States but you are going to have differences within the States.

If you eliminate that by reposing a finality in the State supreme court, then that is an interesting proposition.

For the reasons that several other people have expressed, I am against it as a sound matter of policy, because I think it extremely unwise and undesirable and unwholesome to have identical clauses in the Constitution of the United States produce mutually exclusive outcomes, depending upon the accident of what geography the case happens to arise under.

It will produce citizenship confusion, in my view, and a sense of bewilderment and diminution in the importance of the underlying document.

While I have the floor, I want to make my response also—a covert occasion—to respond in part to Mr. Rice's observation.

The abortion decisions, or the voluntary school prayer decisions, of course, are not the first which may have impressed many members of the body politic and many Members of Congress conscientiously as raw, crude, unprincipled judicial usurpations. They are not the first.

It happened after the court had barely been in business, as a matter of fact, when it construed a portion of article III to tolerate suits of out-of-State residents against States as sovereigns, seeking money damages.

There was widespread agreement, I assure you, by professionals and not merely by angry States-rightists.

It might have been coped with under the exceptions power, but rather than paying the price of a badly fragmented and useless

Constitution that differs from locale to locale, the 11th amendment was pressed through.

The amendment to the Constitution after the infamous slave case, Dred Scott, produced a very angry response in this Congress. It produced a bitter dissent within the court itself. Dred Scott might have been coped with in an inadequate way by some kind of alleged surgical strike to the appellate jurisdiction. I doubt it.

Instead, we had an amendment to the Constitution.

The decision by the court in the first income tax, holding that a tax on income derived from the rental of real estate is a direct tax and therefore had to be apportioned, produced a very angry response. We had the 16th Amendment.

So far, therefore, it has been the uniform sentiment of Congress that when the court misbehaves, in Congress' view, it will seek recourse to that ordeal of the amendment process or, alternatively, seek to influence a reversal in the long term by influencing the staffing policies on the court to work with a president of a different temperament—in one case, it was Lincoln; in a different case, it is Mr. Nixon—such that the next series of appointees will reflect a different perspective in construing the document so that you may even get an overruling of the Supreme Court's decision—a different outcome to be sure but at all times, at any rate, a national sense of uniformity in the application of the underlying doctrine.

My original answer stands. I see no conflict of the kind. I accept the implications of your quotation from Senator Ervin on this.

It is rather on firm policy grounds that I would encourage the Congress always to alert the public to its own sense of dissatisfaction, to be sure, but to stay with those techniques of constitutional alteration in staffing and amendment which have represented the unbroken practice of this country since 1793 in the 11th amendment.

Mr. **Rader**. Mr. Cutler?

Mr. **Cutler**. It seems to me that one point which has not been sufficiently stressed is that these bills would not only bar the Federal courts from adjudicating the constitutionality of State statutes and the actions of State officers, but these bills also would bar the Federal courts from adjudicating the constitutionality of what the Congress and Federal officers do as well.

How could the Constitution possibly have conceived a situation in which Congress was free to enact a statute—let us say, a statute that just runs roughshod over the fourth amendment and allows unreasonable searches and seizures by Federal officers or a statute which bars the writ of habeas corpus in all Federal courts in flat violation of article III, section 9—and then add a clause barring the jurisdiction of the Federal courts to construe that statute.

How is a State court going to get at that problem? It seems to me that is clearly an unconstitutional use of the exceptions clause and the power to define the jurisdiction of the lower Federal courts.

Mr. **Rader**. Mr. Rice?

Dr. **Rice**. I would like to basically agree with that.

In terms of prudence, you have a different situation where you are proposing a statute taking away the appellate jurisdiction of the court to rule on the constitutionality of a State law or State action from a situation where you are taking away from the court the power to rule on the constitutionality of Federal action.

I think it would require a much heavier burden to show that it was prudentially sound to take away the jurisdiction over such Federal action than it would to take away the jurisdiction over such State action.

I agree with Mr. Cutler's reservations on that.

I also basically agree with Professor Van Alstyne in his comment that if you do take away the appellate jurisdiction of the Supreme Court, I think in practical terms you necessarily have to take away the jurisdiction of the lower Federal courts over that same subject. Otherwise, you would have a Disneyland of constitutional interpretation within a State with U.S. district courts and State courts running on different tracks and coming up with different interpretations.

However, I do not agree with Mr. Van Alstyne on two points.

One, he criticized the notion that it could be legitimate to have variant interpretations of the Constitution in different States—to have a different interpretation of the Constitution in Pennsylvania from that which it obtains in the State courts of New Jersey.

This, in fact, was the situation under the 14th amendment under the Twining and Palko doctrines, particularly as enunciated by Justice Cardozo, until the Supreme Court on its own initiative decided that the 14th amendment was intended to make the Bill of Rights strictly applicable against the States.

There is no necessary edict written on tablets of stone on Mt. Sinai in a constitutional sense saying that you must have these uniform interpretations, particularly where you are dealing with constitutional rights which come in under the 14th amendment.

The final point on which we would be in disagreement is that I simply cannot imagine how it could be sound constitutionally to say that every time you get a 5-to-4 decision or a 9-to-0 decision of the Supreme Court on a constitutional question, the people of the United States are thereby obliged to go to the ultimate remedy and crank up the machinery of constitutional amendment in order to do anything about it.

We have a much more limited and more prudent device right here in article III, section 2. It is in the Constitution. It is there to eliminate these inconveniences, as Hamilton said. It just makes a lot more sense to say that this is an alternative that Congress can pursue, rather than to say that every time there is a decision that comes down the Congress finds greatly objectionable that cannot be cured by a statute, the Congress is obliged to set in motion the constitutional amendment machinery.

One of the virtues of our Constitution is that it is rather short, and it should stay that way.

Mr. RADER. Professor Redish?

Dr. REDISH. I am afraid I find myself in rather serious disagreement on one significant point with Professor Rice and on another with Mr. Cutler.

First, as to Professor Rice's last point, I think there is a fallacy in his analysis which is that use of the exceptions clause to regulate jurisdiction is a substitute for the amendment process to overrule a Supreme Court decision.

Excerpting from the Supreme Court's jurisdiction in no way overrules previous Supreme Court decisions. Quite the contrary, it locks them in.

Under the supremacy clause, all lower Federal courts and all State courts are bound by the Supreme Court's interpretations on the Constitution.

For example, if Congress were to remove jurisdiction in abortion cases from the Supreme Court, that does not overrule *Roe* v. *Wade*—clearly not. *Roe* v. *Wade* is locked in and cannot be changed by anybody. The only court that can overrule the Supreme Court is the Supreme Court.

Therefore, it is clearly not an alternative to the amendment process.

I differ with Mr. Cutler on his conclusion that removal of jurisdiction from both the lower Federal courts and the Supreme Court would be unconstitutional, as unwise as I find that. Mr. Cutler cites the well-known doctrine that State courts do not have power to enjoin Federal officers.

Frankly, that particular issue is somewhat up in the air. The Supreme Court has never decided that.

What they have decided is that State courts lack the power to issue writs of habeas corpus and mandamus to Federal officers.

The difficulty is that the only rationale to justify those decisions is an inference of congressional intent from congressional silence.

Therefore, if in legislation closing off the Federal courts Congress simultaneously opened the State courts to enable State courts to directly control the actions of Federal officers, there would certainly be nothing unconstitutional about closing off the Federal courts, even if it did involve, as Mr. Cutler says, a fourth amendment case, or any case involving a Federal officer.

All that the due process clause requires to enforce constitutional rights is the availability of some forum, independent of Congress, to be the final arbiter.

Under our constitutional system, unfortunately I believe, that can be the State courts. It is not the way I would set it up now; but we are not writing on a clean slate. Therefore, if Congress truly desires the State courts to have the final say, even on actions directly controlling Federal officers, I believe they can do so if they say so explicitly in the legislation closing off the Federal courts.

Mr. RADER. Professor Rice, would you like to make a point?

Dr. RICE. On the point that was just made, of course, the exercise of the exceptions power under article III, section 2, would not overrule a Supreme Court decision.

What it would do, as I pointed out in the written statement and have not gone into orally, is that it would allow the States to make their own constitutional interpretations.

The Supreme Court decisions would still be the last highest decision on the point. It would prevent those decisions from being further extended.

It probably, or possibly at least, would lead to the situation where some State courts would disregard those decisions.

I do not think we ought to regard that as a tragedy. I think we ought to realize that we are talking about exercising this power only in cases where the Supreme Court's decisions have been regarded as essentially usurpations.

In any event, if the disharmony, or whatever, became intolerable or even undesirable, Congress could very easily by another statute restore that appellate jurisdiction.

I agree with you. Of course, it would not overrule the court's decision. It is an alternative to the amendment process in the sense that it is an effort by Congress to encourage a correction and to restrain an essentially runaway Supreme Court on a particular issue. Of course, it would not technically overrule the Supreme Court decision.

Mr. RADER. Could I change the direction here for just 1 second.

Mr. Cutler, your testimony makes an excellent point that if Congress imprudently deprived the Supreme Court of all jurisdiction to hear any appeal, the role of the Federal judiciary could clearly be impaired.

I do not know of any legislation at this point that would go to that degree. Instead, I am reminded of the dictum of the court in *Klein* v. *United States* when it said that if the Congress simply denied the right of appeal in a particular class of cases, there could be no doubt that it should be regarded as an exercise of the power of Congress to make exceptions.

If Congress were not trying to strip the Supreme Court of all appellate jurisdiction but only intending to uphold federalism by letting State courts decide a limited and—I think Professor Rice used the word—narrowly drawn class of cases, would your analysis change at all?

Mr. CUTLER. No; I don't think it would.

*Klein*, of course, is a case involving an appeal from a lower Federal court created by the Congress; namely, the Court of Claims. For awhile it was doubted whether it was a constitutional court or not, but that is now established.

The Federal judicial power, as defined in the Constitution, can be, except for the original jurisdiction of the Supreme Court, distributed under the exceptions clause between the lower Federal courts and the Supreme Court itself.

Although I appear to be a minority of one on this panel, it seems to me that the theory is constitutional for the Supreme Court to take away all Federal jurisdiction from all the Federal courts, even as to issues involving the States, breaks down in several ways.

Suppose, for example, that the State then enacted a similar statute about its own courts dealing with, say, abortion or school prayer or something else. One might say that statute is unconstitutional because it violates the supremacy clause.

That would be a theory which, it seems to me, is difficult to articulate—that the States may not limit the jurisdiction of their courts to pass on constitutional issues but the Congress can limit the jurisdiction of the Federal courts to pass on constitutional issues.

It also seems to me that any doctrine that opens up the notion that Congress may take a measure and then bar all access to the courts to challenge the validity of that measure is an extremely dangerous doctrine and one which the framers could hardly have contemplated.

It also seems to me that the idea that all such issues would be finally remitted to the State courts, so that the Federal judiciary including the Supreme Court, lacked the power to pass on any Federal constitutional issue or any specific constitutional issue, makes a mockery of article III and the notion that there should be Federal courts to interpret or pass on classes of cases, including all cases arising under this Constitution.

Mr. **Rader**. Professor Redish?

Dr. **Redish**. To say that removing all Federal jurisdiction would make a mockery of article III, to me disregards the language of article III which specifically says that Federal courts need not have been created in the first place.

It says that Congress has the power to ordain and establish Federal courts from time to time. Presumably, Congress could, quite conceivably, under article III, abolish them.

Again, as I say, I think that would be extremely unwise.

I certainly agree with Mr. Cutler that it would be a very dangerous doctrine, but the entire history of article III is the assumption of the fungibility of State and Federal courts.

I think as a practical matter today that is an absurd notion, but it is one that is embodied in article III itself.

Mr. **Rader**. Professor Rice?

Dr. **Rice**. I agree with that.

I want to emphasize that we are not talking about such very broad measures. We are talking about narrowly conceived devices to withdraw jurisdiction over particular types of cases.

I agree that technically Congress could even abolish the Federal courts. I would not propose it.

Mr. **Cutler**. Including the Supreme Court?

Dr. **Rice**. No. The Supreme Court is the only court which is established by the Constitution.

Dr. **Van Alstyne**. It could leave them very little business.

Mr. **Cutler**. There is another point. The original jurisdiction of the Supreme Court includes suits against States. It was held a long time ago that although the 11th amendment explicitly deals only with suits against a State by citizens of another State, the proper interpretation of the 11th amendment and the reasons that led to its adoption would also bar from the Supreme Court's original jurisdiction suits by a citizen against his own State.

That doctrine might very well come in for reexamination if the Supreme Court were denied all power to review constitutional issues that come up out of the State courts.

Dr. **Van Alstyne**. You see how we wander into other clauses.

That is very appropriate, because I want to do that even with regard to Mr. Rice's notion of surgically limited and narrowly defined exceptions.

On Mr. Cutler's point, I think that probably it is unsound as a matter of adjudicated law.

If the person engaged in litigation with his own State—as would be true with most of the situations contemplated by these pending bills—is involved in litigation with his own State—not because he has filed suit in some court but rather because he has become criminally prosecuted—as a woman might be criminally prosecuted under a suitable State statute for abortion—the Supreme Court itself held that although that is a case involving a State—a case to which a State is a party—which in the language of article III seems to come within its original jurisdiction that Congress cannot touch or diminish—nonetheless the fourth Chief Justice of the United States did hold in a very famous case, *Cohens* v. *Virginia*., that that kind of case where the State is the moving party against its own residents in a criminal transaction is a case which comes up through the State court and arrives in the U.S. Supreme Court under its appellate jurisdiction and not under its original jurisdiction.

Last, for purposes of the argument, it is the appellate jurisdiction, rather than the original jurisdiction, that is subject to the exceptions power.

Having said that much, its usefulness is really to show how these arguments and other clauses tend to introduce confusion and unclarity. Even Mr. Rice's presentation is subject to this observation.

Let me here be very concrete.

I agree that a State supreme court, of course, feeling bound by its oath of office but knowing that its decision cannot be reviewed by the U.S. Supreme Court might simply disregard a case like *Roe* v. *Wade* on the basis that in its opinion, respectfully, *Roe* v. *Wade* was unsound. If it was unsound at the time in the view of a state supreme Court, it is no less unsound now.

Having examined it as a matter of stare decisis, they nonetheless elect not to follow it. Correspondingly, under a bill that has been proposed, they might thereupon affirm the criminal conviction of a woman for a first trimester medically advisable abortion.

However, if indeed the act of Congress sealing off from review that very State supreme court opinion can accurately be described by the U.S. Supreme Court as an act of Congress which contemplated and, indeed, desired this outcome in this hypothetical State supreme court, then the effect of the act of Congress is to take from the woman a constitutional right of abortion, which in the court's opinion has already been established as being part of her liberty under the 14th amendment.

If you characterize the act of Congress as an act which means to encourage State supreme courts to reach different outcomes, the net effect of which is to undermine a previously established U.S. Supreme Court fundamental right of woman's liberty, then you may invalidate the act of Congress—not because it is outside the exceptions clause but because it is a violation of the woman's right of abortion as the court already adjudicated it in a case called *Roe* v. *Wade.*

In short, you are linking a concept of the woman's freedom of abortion, as established by the Supreme Court's decision in *Roe* v. *Wade,* as the foundation according to which any act of Congress, the ambition and consequence of which is to destroy that previously established right in the woman.

Mr. RADER. Then the constitutionality of the statute would be dependent upon a ruling of the State court?

Dr. VAN ALSTYNE. No. The U.S. Supreme Court, of course, would always have the power to review the act of Congress, which act prevents it from reviewing the State supreme court judgment.

The question then is whether that act of Congress, foreclosing their review, is itself unconstitutional.

Mr. CUTLER. Suppose the act would do away with that jurisdiction?

Dr. VAN ALSTYNE. Then that, in turn, is just an infinite regression, as the excellent rhetorical skill of your question suggests.

If the correct characterization of the act is to produce an outcome which in the opinion of the Supreme Court achieves a deprivation of a person's liberty, contrary to their constitutional entitlement, then the act of Congress may be separately invalid on that ground, though otherwise well within the scope of the exceptions clause.

Again, I do not want to run on in this fashion; because it gets tedious, and we have too many things to discuss.

I do mean to put you on notice, however, that even if you accept the view that three of us to one in this group hold, contrary to yesterday's group perhaps, that the exceptions clause is very broad, please take seriously my earlier suggestion that I have seen no bill drafted in this Congress in the last 20 years as an attempt to use the exceptions power, which in my own professional view would have withstood successful constitutional assault—not on the exceptions clause but on the strength of clauses that surround it in other areas of the Constitution.

That is just to add to the general wisdom of the congressional prudence, thus far unbroken in American history, not to attempt to deal with these problems in this particular fashion.

It is harder than one imagines when we talk about it in the abstract, I assure you.

Mr. RADER. We probably want to come back to that, but Professor Rice would like a chance to respond.

Dr. RICE. I would like to stay with that for a moment.

You can take any number of constitutional provisions and abstractly push them to the point where there will be a constitutional crisis or a collision between Congress and the courts and so forth.

One of the things that was not really determined in the constitutional convention was the effect of a decision by the Supreme Court upon the Congress. To what extent do Supreme Court decisions come under the supremacy clause as the supreme law of the land.

It was not until the 1958 case of *Cooper* v. *Aaron* that the Supreme Court said that its decisions were the supreme law of the land.

That itself is a very troublesome doctrine. You could take any one of these proposed bills and foresee a constitutional collision. Any of these bills, if enacted into law, would go before the Supreme Court for adjudication.

If you have a decision in the Supreme Court on the bill, it has to address itself to whether it is within the exceptions clause. Of course, there would be brought up the point that Professor Van Alstyne is raising. Is this, in fact, not merely an exception, but is this an attempt to overrule by statute directly *Roe* v. *Wade*?

That would involve another thing. We could spin this out indefinitely. Should the court inquire into the motive of the legislature.

I think you can very easily construct a parade of horribles here. You would end up by saying that article III, section 2, is so dangerous it should never be used and can never be used. I do not agree with that.

It is a very difficult prudential question as to whether it should be used and how, but I personally do not accept the notion that the Supreme Court's edicts are the supreme law of the land, in the sense that we are all irrevocably bound by them to the extent that we have to go and crank into operation the cumbersome amendment process to the Constitution.

As Abraham Lincoln said, if that is the case, we have ceased to be our own government if the meaning of the Constitution is finally decided in litigation between parties before the Supreme Court.

These are problems that come up. I do not think that they militate or dictate the rejection of the exceptions clause technique.

In enacting the thing, it should be made clear that the intent here is not to dictate a particular type of result in the State courts and not to say that we are doing this in order to reverse *Roe* v. *Wade*.

No; you are doing it in order to go back and let the State supreme courts look at this without fear of being overruled to prevent further extensions of these erroneous decisions and then to see how it develops.

Mr. Rader. Thank you.

Next we will hear from Professor Redish and then Mr. Cutler.

Dr. Redish. I am a little surprised by some of what Mr. Rice said.

I thought *Marbury* v. *Madison* had settled a lot of the issues he seems to be raising. I think it is a little late in the day to question whether the supreme court's word is the final word on the meaning of the Constitution.

Mr. Cutler. As Professor Van Alstyne indicated, these particular bills have a lot of vices, even if there is broad power to use the exceptions clause.

For example, I take it, under these bills, that a State abortion law conviction, while not reviewable, say, on *Roe* v. *Wade* grounds in the Supreme Court, would still be reviewable on other constitutional grounds—for example, whether the jury had been properly formed, whether there were enough women on the panel from which it was selected, whether the defendant had adequate right to counsel, and other constitutional issues.

That poses a situation in which the Supreme Court has appellate jurisdiction, but it is denied the power to decide the case on one constitutional issue.

As Professor Wechsler, one of the most benign in construing the power of Congress under the exceptions clause, has clearly said, it would be unconstitutional as a violation of the supremacy clause to give the Supreme Court appellate jurisdiction over criminal convictions but to deny it the right to invoke a particular ground for reversal.

Mr. Rader. Thank you.

I would like to return for just a second to something that I think you mentioned a moment ago, Professor Van Alstyne.

If I recall correctly, you said that none of the bills you have seen proposed under the article III, section 2, exceptions power would meet a constitutional test when compared to other phrases and clauses within the Constitution.

The Senate passed, as recently as the last Congress, a bill which would have used the exceptions power. That was in connection with voluntary prayer in public buildings.

Let me turn the tables around and ask you what would be an appropriate use for the article III, section 2, power. How would Congress fashion a use of the power so as not to fall prey to an unconstitutional ruling when reviewed?

Dr. **Van Alstyne**. I am glad you asked me that question, because I do not want to be misunderstood as suggesting that the appellate exceptions power should never be used. Neither do I want to be misunderstood to have suggested that it has never successfully been used.

It has often been successfully used, but not in the particular fashion of these most current pending bills.

It is true from the beginning—from 1789—up until 1981 that certain kinds of cases which are within the judicial power, and therefore tentatively vest in the Supreme Court, could never be heard in the Supreme Court.

Mr. Hatch quoted before he departed and Mr. Rice has quoted from Alexander Hamilton's Federalist comment about inconveniences.

Lots of uses by Congress have been made of the exceptions power for purposes of convenience. Diversity cases that do not reach a certain jurisdictional amount but do involve trivial sums of money, for instance, could in the beginning of the country never have reached the Supreme Court though they are within the judicial power.

Hamilton was writing partly in the context of worrying out loud. If you read article III the Supreme Court can review not merely issues of law but jury determinations of fact.

That drew a lot of flak when the Constitution was under consideration. Lots of people thought it implausible to suppose that jury decisions of what happened and who did what could be retried in the Supreme Court of the United States. They feared such a form that might relitigate the finality of jury determinations that might often be friendly to criminal defendants.

It is partly in that context that Hamilton makes his observation. If you fear the tentative power of the Supreme Court, even to relitigate and reach a different outcome on what happened, then Congress can deal with that inconvenience—your anxiety about jury trials.

Indeed, we have. We have dealt with it by statute and by amendment—the sixth and seventh.

I know this is not exactly the response you were searching for, but I mean to assure you that the exceptions clause is not toothless. It has been used. It has never been used successfully by Congress for the purpose of trying to repose in the State supreme courts a finality of substantive constitutional adjudication arising from dissatisfaction with the preexisting substantive constitutional decision by the Supreme Court.

The nearest occasion Congress ever got to it was in *McCardle*, and they thought they had succeeded. The last Congress had overlooked an obscure alternative procedure, and they failed.

The bills I have seen, the one that has come closest—and it is uncanny you choose that example—to what might be arguably a valid use, even in this incendiary area of reaching a sense of discord because of precise Supreme Court constitutional decisions and not these lesser things—diversity cases, amounts in controversy, jury findings of fact, and so on—is that voluntary school bill.

Among the bills I have seen—I am not a particular friend of its sponsor—it is a professionally well-crafted bill.

I do think it has some difficulties and would have a fair chance of being held invalid.

Let me entertain you with only one difficulty, because I do not want to take your time and it is just one bill.

As you will recall, the bill in its own terms that this Senate did approve merely restricts review in any Federal court—lower or Supreme—of any case drawing into question a State law or local school board regulation providing for "voluntary" school prayer. I think I have recaptured the essence of it reasonably well.

There is a preliminary jurisdictional question in a case that might arise in a public school system had that act been adopted by this Congress and a protesting child and his parents filed suit in a Federal district court.

The first question is jurisdiction. The act of Congress is put in to show why there is no jurisdiction. The Federal judge in order to determine whether he has jurisdiction, according to the language of the statute, must first determine as a matter of fact whether the prayer is 'voluntary.'

It may be that no one is told at the point of a gun or under threat of expulsion that they must participate in the prayer.

But the Federal judge has perfect latitude to say:

> I read the decisions of the Supreme Court essentially to state that though the school board may say this is a voluntary school prayer and though it may accommodate dissenting families by providing even for a mode of excusing their offspring from being physically present, nonetheless, given the tender age of the children involved and the compulsory nature of school attendance, and the usual observations of peer group pressure and the identification of the authoritarian nature of the State in behalf of the particular prayer, I conclude it is not authentically voluntary.
>
> If the prayer is not voluntary, then the statute does not apply and I may hear the case.
>
> Now that I hear the case, I have applied the Supreme Court cases on voluntary school prayer. It is a violation of the establishment clause.

There are other problems with it, but that one just occurs to me readily, even though among the bills I have seen that is a first-rate piece of drafting.

Mr. **Rader**. Professor Rice?

Dr. **Rice**. I agree with that observation. I think that you do have to bring these statutes before the courts for adjudication. If the statute is limited only to a certain type of case, of course, the court has to decide whether this is that type of case.

The voluntary/involuntary distinction is not free from difficulty. I think that that statute could well be improved upon in that respect.

There is no question but that a Federal district court could say it agrees with the statute and that article III, section 2, supports the statute; but that, however, this is not that kind of a case.

The article III, section 2, power is very, very broad. I know Professor Van Alstyne did not mean to imply the contrary, but I want to make sure that it is clear that it is not limited to questions of fact.

As Hamilton pointed out in Federalist 81, both questions of law and fact are within the exceptions and regulations provision.

You do have this problem of the court, in effect, passing on a statute which takes away its own jurisdiction in deciding that it is unconstitutional to do it.

You may have, theoretically perhaps, a constitutional crisis. But that is not an argument against Congress having the power. It is an argument against the power being exercised, except in the most serious cases. I happen to support its exercise in several of these cases.

Mr. RADER. If perhaps only because Professors Ratner and Taylor were so persuasive yesterday in their expounding of the essential functions test, I would like to return to just one aspect of that doctrine with this question.

How would we decide—and, beyond that, who would decide—what is an essential function? If that test were to be used to examine one of these statutes—the school prayer, the busing, the abortion, or any number of other statutes which could be crafted in this area—what standard could be used in determining what is an essential function and how is that term to be defined? Second, who would make the determination of an essential function and its conflict with the statute involved?

Could we start with Mr. Cutler on that?

Mr. CUTLER. I will set out my extreme.

I think the essential function includes at least the availability of some Federal court to construe the Federal constitutionality of a Federal action and the availability of a Federal court to construe the Federal constitutionality of a State action.

Mr. RADER. Would not the court itself make that determination? Would this leave the court in the position of setting the limits on its own jurisdiction?

Mr. CUTLER. I would suppose that if everyone here agrees that Congress could not bar the Federal court from reviewing the constitutionality of the act purporting to take away its jurisdiction, it would be made by that Federal court.

Mr. RADER. Is there any response to Mr. Cutler?

Dr. REDISH. I am not sure it is a response; it is more of an elaboration on the essential functions thesis.

I was not here yesterday, and I did not hear the testimony of Professor Ratner or Professor Taylor. I am familiar with Professor Ratner's article in the field.

It appears to me that anyone who is arguing that constitutional language should be read in a way that is totally contrary to its natural import has a rather severe historical burden of proof.

No one can maintain that there is any mention at all of the phrase "essential functions" in the Constitution.

The history that Professor Ratner cites in his 1960 article in the University of Pennsylvania Law Review, I think, is extremely unpersuasive. In fact, there was virtually none.

The only history that I saw that was even arguable was that apparently there was a motion to amend the clause to read that the Supreme Court shall have such appellate jurisdiction as the legislature shall provide, and that was defeated.

Professor Ratner infers from that if the Framers really intended Congress to have such broad power, they would have simply adopted that particular phraseology.

The fact that they did not means that, obviously, they did not want the clause to go that far.

That is certainly not the only interpretation of that history, and probably not even the most logical one.

Much more logical, I would think, is that the drafters decided to have the inertia in favor of Supreme Court jurisdiction and require affirmative action by Congress to remove it if it so desired, rather than require affirmative action by Congress to give the Supreme Court jurisdiction.

To me, the essential functions thesis is really little more than constitutional wishful thinking.

Mr. RADER. Professor Rice, do you have a comment?

Dr. RICE. I agree with that.

However, it is also true that the Supreme Court very early in the game, in 1805, in *United States* v. *More* enunciated the negative pregnant doctrine that an affirmative grant of jurisdiction implies the negative over other jurisdictions.

The essential functions test is an academic creation. It is not something that has support, as Professor Redish just pointed out, in the language of article III, section 2, or anywhere else.

I think you have to assume that Justices of the Supreme Court, as Congressmen, are going to carry out their oaths conscientiously.

You could conjure a case where Congress had done what Prof. Henry Hart discussed—take away all but a residuum of jurisdiction—for example, taking away jurisdiction from the Supreme Court in everything but patent cases.

That is the kind of statute, I think, that could very readily lend itself to that sort of interpretation. However, that is light years away from what we are talking about.

A narrowly drawn statute taking away the jurisdiction over any of these subjects we have been talking about could raise other questions of the kinds we have been talking about.

But I think it would really be bootlegging something into the Constitution that does not belong there to subject it to some sort of vague essential functions test which necessarily would be subject to the decision of the Supreme Court.

The court itself would become the final arbiter of its own jurisdiction, even in the face of a statute enacted under article III, section 2.

Mr. RADER. Professor Van Alstyne?

Dr. VAN ALSTYNE. The blunt answer, of course, to part of your question is that the Supreme Court will determine if and when the time comes as to whether there is such a thing.

I agree that it is, so far, of academic sponsorship only. That is true.

I would not want the committee to dismiss it solely on that account—not only because I do not want my own importance impugned but because it is an historical matter.

A great deal of American constitutional law has been generated ultimately through the Supreme Court as the natural outcome of very powerful, merely academic theory, as a matter of fact. It ought not to be lightly dismissed on that account.

It is not possible to provide a more precise definition of essential functions than you and the rest of the staff can gather from the writings—Henry Hart, Mr. Ratner, or others.

I have summarized it on page 13, as precisely as I could.

We cannot be more precise than that as an historical matter, because no such phrase appears in any of the original documents. None of the very scanty minutes from the Philadelphia Convention devote themselves to this problem.

Prof. Julius Gobels who really wrote an exhaustive work on the early origins of the Supreme Court says that so far as he can ascertain, there simply is no recorded minutes devoted to the exceptions clause out of Philadelphia itself.

There is lots of discussion elsewhere to be sure, but that phrase no where appears. The phrase no where appears in any Supreme Court opinion.

Some lower Federal courts within the last 25 years—roughly since the appearance of Mr. Hart's article and a little bit more impressively since Mr. Ratner's—have begun to pick it up and hedge. Without using the phrase, they have suggested that there may be some limitation on the question.

It is not all on one side.

I quite agree with my colleagues. Indeed, I have made very clear that I have no doubt, privately, as to the expansiveness of the exceptions clause.

It really would mistake and miscomprehend history to suppose that the kinds of questions we have been devoting ourselves to—namely, the power of Congress to check the Supreme Court's decisions on constitutionality—was much discussed.

Almost all of the discussions that I have been able to locate with regard to uses of the exceptions clause really had to do with much more modest matters—amounts in controversy, diversity jurisdiction, findings of fact, and things of that sort. Indeed, it may seem striking—particularly to lay persons attending this hearing. However, the role of the Supreme Court in terms of its principal importance, and the way in which we identify it is so important to the National Government in the adjudication of constitutional matters, really was not much discussed in 1787.

The felt necessity to have a supreme tribunal was not particularly on the basis of enforcing the Bill of Rights which was then several years later—1791—or checking the States as such, as a matter of fact.

The necessity of a Supreme Court was more because you needed someone to reconcile conflicting—whether they are State court interpretations or lower Federal court interpretations—interpretations of acts of Congress.

That necessity to have a reconciling tribunal helps to explain why we create a Supreme Court. There are a lot of other reasons.

There is a lot of discussion but very little in terms of the anticipated role of the Supreme Court in matters of substantive constitutional adjudication.

While I think the exceptions clause does, indeed, mean as it says, I do not want to deride what are highly coherent and rather attractive arguments in gestation, in academic production, which like others—indeed, like the very substance of *Roe* v. *Wade* itself or *Brown* v. *Board of Education* may have fairly academic origins and yet are ultimately persuasive to the court that will determine the matter.

I disagree very seriously with those arguments, but I am not inclined to take them lightly. Moreover, I suggest prudentially that the court as an institution may develop its own sense of collegial loyalty.

If it feels as though Congress is setting foot on a slippery slope of an infinite series of retaliatory, surgically drawn laws, that very sense of defensiveness might very well draw the brethren together to accept at least core elements of this essential functions theory, creating an implied limitation within the exceptions clause itself.

It is a very interesting and fair contest.

Mr. Rader. I would like to ask just one more question and then perhaps we could give each of you gentlemen a chance to summarize.

The final question is one which I will direct to you, Professor Rice.

The Supreme Court, as has been quoted in Mr. Cutler's testimony very persuasively, noted in *Martin* v. *Hunter's Lessee* the necessity of uniformity of decisions throughout the United States. How can the exceptions power be reconciled with that case and that requirement for uniformity, if it is a requirement?

Dr. Rice. You have a fair conclusion from the constitutional convention that the framers relied upon the State courts as the arbiters of what the U.S. Constitution meant with respect to State laws.

*Martin* and other cases have established that those decisions are subject to Supreme Court review.

The question is whether there is a constitutional right to uniformity of such review in all cases.

I submit that you cannot say that without excising article III, section 2, from the Constitution. Article III, section 2, itself is part of the Constitution.

Yes, there is a power of the Supreme Court to review those State court interpretations, but that power of the Supreme Court itself is subject to article III, section 2.

We ought not to be so terrified of variant State interpretations in some of these areas of personal rights. You have the precedent of a longstanding doctrine, which comparatively recently was overruled.

That is the Palko doctrine. That is that the bill of rights will not be applied uniformly in all respects to the States but to only those matters which involve concepts implicit in ordered liberty, and so forth.

Therefore, the States had latitude to experiment in these areas.

What the exceptions clause could do in a particular subject matter, whichever one we are talking about, would be to provide such latitude for maneuver and such latitude for development by the States, at the same time cutting short further extensions by the Supreme Court of a line of decisions which the Congress adjudges to be seriously a usurpation.

Give the States the power to develop this thing. Then if inconveniences—if you want to use that term in the other direction—or if problems arise, Congress can always restore the Supreme Court's appellate jurisdiction.

On your basic question of the need for uniformity: Yes, the State court decisions are subject to Supreme Court review. However, do not forget that article III, section 2, is part of that Constitution also. There is no constitutional right to such review in all cases, as long as article III, section 2, is there and as long as Congress has decided to except particular classes of cases from the Supreme Court's appellate jurisdiction.

Mr. **Rader**. Mr. Cutler?

Mr. **Cutler**. Article III, section 2, does have this exceptions clause as to the allocation of jurisdiction between the Supreme Court and lower Federal courts.

It also says in the same article that the judicial power—the Federal judicial power—shall extend to all cases arising under this Constitution.

There is no exceptions clause in the sentence creating the judicial power. It does not end up saying: with such exceptions as Congress shall make.

That suggests to me that, while nondiscriminatory benign exceptions under the exceptions clause as to jurisdiction may be constitutional, for Congress to say a particular class of cases arising under the Constitution or a particular constitutional issue is removed from the Federal judicial power in its entirety would move the exceptions clause from the place where it really is—affecting only the allocation of appellate and original jurisdiction—into the definition of the Federal judicial power. It is not a fair reading of article III.

Mr. **Rader**. Professor Redish.

Dr. **Redish**. Briefly, as to Mr. Cutler's comment: He emphasizes the "shall extend" or "shall be vested" language in article III.

Certain authorities going back to Justice Story have emphasized that language is a limit on congressional power to limit Federal jurisdiction. However, it is simply inconsistent with the history and traditions of the Constitution to read that language as a limit on the remainder of the clause which so clearly and explicitly embodies Congress with power to cut back on the jurisdiction.

I am much more concerned for the moment with distinguishing my views from those of Mr. Rice.

While I agree with Professor Rice on the meaning of the Constitution, I am very troubled as a matter of social policy and social wisdom by this legislation. There may not be a constitutional right to uniformity as Professor Rice says, but I think there can be no doubt that the Nation is considerably better off with it.

I think there is a mistake in much of the policy assumptions behind this legislation. There is a confusion between deference to State courts and deference to State law.

I think those sponsoring this legislation believe they are deferring to State law and State interest as a matter of federalism when they close off the Supreme Court.

Really they are not. When State courts interpret the 14th amendment, it is still Federal law. Under the supremacy clause and our traditions, the State courts are obligated to enforce the Constitution as enthusiastically as the Federal courts.

I believe Mr. Rice's view comes down simply to the fact that by cutting off the jurisdiction of the Supreme Court, we can hope that somehow surreptitiously the State courts will engage in civil disobedience.

I think that is a very, very dangerous and unfortunate theory on which to premise congressional legislation.

Mr. **Rader**. I would like to offer each of you an opportunity to make any final suggestions to the subcommittee.

Mr. Cutler?

Mr. **Cutler**. I have nothing to add.

Mr. **Rader**. Mr. Van Alstyne?

Dr. **Van Alstyne**. I have nothing novel to add.

I do think the power of Congress with regard to the exceptions clause is very broad. I do not think it appropriate for Congress ever to use it—however their indignation may be—to try effectively to overcome the consequence of a Supreme Court decision on a matter of substantive constitutional law.

I would observe that despite at least equal provocation in prior generations, no previous Congress of the United States has ever employed the exceptions clause for that particular purpose.

I derive from that not a lack of power but a great sense of State craft and prudence under the circumstances.

I do hope by all means that they will pursue that example, even in our own time.

Mr. **Rader**. You would say then that the *McCardle* incidence was not the use of it in that sense?

Dr. **Van Alstyne**. It was not. As I say, it is the one instance where the historical record is abundantly clear that Congress meant to do exactly that. They thought they were doing it, Mr. Chairman.

We learn even from the surprising consequence that when given their very best effort, it fell short on highly technical grounds. It simply overlooked something. It might be useful to reiterate that observation even here.

It is perfectly surprising, but it is exceedingly difficult, to use the power in precisely that way. That is best illustrated by the current effort to draw it into that use.

I will be back here in 2 hours to deal with a bill, one feature of which does it. Respectfully, the bill fails. It will not possibly achieve its desired result.

It will introduce, perhaps, a certain amount of public exhilaration for some if it is passed and great anxiety and dismay for others. It may take 24 months or so to sort it out if it were to be adopted before it would be held invalid. Then we are back to where we are now.

Every generation thinks that it is peculiar or unique in terms of its intragovernmental disputes. That was true with regard to perhaps the most poisonous decision ever handed down by the Supreme Court of the United States in the *Dred Scott* case.

It was certainly true on the left in this country, which felt extreme anger against a Supreme Court that kept invalidating acts of Congress and State statutes in the early part of this century on matters of public welfare. It is still extremely instructive to me, merely as a citizen of this country, that at no time did Congress seek to deal with that problem in this particular way.

To a certain extent, it is like the problem a small child has in spelling banana. Everyone knows how to start, but once begun, we have an awful time knowing when to stop. [Laughter.]

I do not think it prudent, therefore, of Congress to get into this business. It may never stop spelling banana once it begins.

Mr. **Rader**. Just a passing question. What about the *Dred Scott* instance? Would you have recommended, sitting as a Senator at that time, that this power be perhaps implemented for the case of *Dred Scott,* recognizing that a constitutional amendment with the majority of the South still in the Union was not feasible?

Dr. **Van Alstyne**. No.

One cannot be pleased with a civil war. I am pleased, at any rate, that the problem was disposed of by an amendment to the Constitution which left no doubt thereafter.

Mr. **Rader**. After a very bloody and a very decisive conflict.

Dr. **Van Alstyne**. Oh, yes.

Mr. **Rader**. Professor Redish?

Dr. **Redish**. All I can say is that with the possible exception of the banana joke, I would heartily endorse the eloquent comments of my colleague. [Laughter.]

Dr. **Rice**. One reason why we have not seen this power exercised before, I think, is because the problem is one of recent origin—fairly recent. That is the process by which the Supreme Court of the United States has itself defined novel rights, which it then sets up in a preferred position and then it demands that we regard those exotic and novel interpretations as the supreme law of the land.

For example, take the right of privacy which the Supreme Court in 1965 in the *Griswald* case found lurking in the penumbras formed by the emmanations of the Bill of Rights—whatever that means.

It stretches the most fertile imagination to suppose that the 14th amendment was intended as the Supreme Court has interpreted it in this area and in other areas. *Dred Scott* is a good example. *Roe* v. *Wade* does the same thing.

They say that whether or not this is a human being, he is not a person. That is exactly the same thing.

You have here the past pattern where, in a very salutary, judicial mode of interpretation, justices such as Cardozo, Frankfurter, and Harlan deferred to State courts in their judgments.

In a very broad range of cases arising under the 14th amendment, they refused to adopt this strict incorporation doctrine by whatever form it was proposed. The Republic did not die.

I suggest that we have become unduly deferential to the Supreme Court. We have adopted the notion that somehow there has to be this uniformity and it has to be concentrated in the justices of the Supreme Court. We have turned the justices into a continuing constitutional convention.

We seem casually to accept the idea that every time a decision comes down from the Supreme Court, if we do not like it and if we find it seriously disruptive and if we find it comparable to *Dred Scott,* we have to crank up the amendment machinery instead of using the limited technique of article III, section 2, giving the court breathing space, in a sense, and preventing further extensions of it—allowing the matter to cool off and let the State courts interpret the Constitution and then see how the thing develops.

I do not want to get into the details of these bills here. I support them in several respects.

I would be very happy to go into the details in writing.

I think we have a substantial agreement here today anyway as to the very great extent of the congressional power under article III, section 2.

I would like to disassociate myself from any inference that might be drawn from the remarks of the others that it is imprudent to think of using this power. On the contrary, I think it very definitely should be used in certain very limited areas.

Mr. RADER. Thank you.

I apologize that the Senators themselves have not been present. Of course, we cannot in any way hope to compensate for that.

Thank you very much for traveling, in some cases, great distances, to be with the subcommittee. We appreciate very much the contribution you have made to this very important question.

Thank you.

We will stand adjourned.

[Whereupon, at 11:37 a.m., the hearing recessed, to reconvene subject to call of the Chair.]

# CONSTITUTIONAL RESTRAINTS ON THE JUDICIARY

MONDAY, JUNE 22, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Grassley.

Staff present: Randy Rader, general counsel; Stephen Markman, general counsel; Claire Greif, clerk; and Peter Ormsby, professional staff member.

Senator **GRASSLEY** [acting chairman]. This hearing is now called to order.

Chairman Hatch is coming into Washington this morning. He has been involved with an international labor conference. He will join us as soon as he can. In the meantime, he has asked that I not keep our distinguished witnesses waiting, and, of course, I must apologize for the fact that I was 5 minutes late.

I, too, have a full schedule this morning and may have to leave before Chairman Hatch arrives. In that event, I will ask our subcommittee counsel to take over until the chairman arrives.

Without objection, Senator Hatch's prepared statement will be included in the record at this point.

[Material follows:]

## Opening Statement of Hon. Orrin G. Hatch, a U.S. Senator from the State of Utah, Chairman, Subcommittee on the Constitution

This is the third day of hearings on this important constitutional topic. At this point the Subcommittee anticipates one more day of hearings on the Article III question. The last day of hearings, when the Justice Department has indicated that it should be able to present its position, is tentatively scheduled for July 31.

Article III vests the judicial power of the United States in "one supreme court, and in such inferior federal courts as the Congress may from time to time ordain and establish." Since Congress has the authority to establish or dismantle inferior federal courts, few constitutional scholars contend that Congress has anything less than plenary authority over their jurisdiction. The jurisdiction of the Supreme Court, however, is governed by other language in Article III. Section 2 specifically enumerates the kinds of cases over which the Supreme Court has original jurisdiction and then provides that "in all other cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to law and fact, with such Exceptions and under such regulations as the Congress shall make."

The purpose of this hearing is to examine the power conferred upon Congress by this explicit language concerning "exceptions and regulations" of the Supreme Court's appellate jurisdiction. The Constitution thus obligates this Committee to learn what responsibilities that language may entail for Congress.

In the first place, the Exceptions clause has important implications in the constitutional scheme of checks and balances. Other than the President's power to appoint judges, this is the only explicit check on the judiciary that the Framers included

IN THE CONSTITUTION. ALEXANDER HAMILTON SEEMED INTENT ON STRESSING THE IMPORTANCE OF THIS CHECK IN THE FEDERALIST, #81:

> ". . . AND THE SUPREME COURT WOULD HAVE NOTHING MORE THAN AN APPELLATE JURISDICTION 'WITH SUCH EXCEPTIONS AND UNDER SUCH REGULATIONS AS THE CONGRESS SHALL MAKE.'" (EMPHASIS ORIGINAL.)

BEYOND THE QUESTION OF "CHECKS AND BALANCES," THIS EXCEPTIONS LANGUAGE ALSO TOUCHES UPON THE FEDERALISM QUESTION. IF CONGRESS WERE TO MAKE A NARROW EXCEPTION IN THE POWER OF THE SUPREME COURT TO ACCEPT APPEALS, IT WOULD IN EFFECT EXPAND TO THAT SAME NARROW DEGREE THE AUTHORITY OF STATE COURTS TO ENFORCE THE CONSTITUTION.

THIS AUTHORITY MAY ALSO CARRY SOME IMPORTANT LIMITATIONS. FOR INSTANCE, IF CONGRESS WERE TO ATTEMPT TO MAKE ITS OWN ENACTMENTS IMMUNE FROM REVIEW IN ARTICLE III COURTS, WE WOULD ALL HAVE TO WONDER IF IT HAD NOT OVERSTEPPED THE BOUNDS OF THE EXCEPTIONS CLAUSE. PREVENTING FEDERAL COURTS FROM REVIEWING ISSUES RAISED BY STATE STATUTES, HOWEVER, MAY BE ANOTHER STORY. THESE ARE ALL IMPORTANT QUESTIONS RAISED BY THE EXCEPTIONS CLAUSE.

CONGRESS IS CURRENTLY ASKED BY MANY GROUPS TO USE ITS ARTICLE III POWER. IN ORDER TO INTELLIGENTLY RESPOND TO THOSE REQUESTS AND THE WARNINGS OF THOSE WHO ADVISE AGAINST USE OF THE EXCEPTIONS CLAUSE, THE SENATE NEEDS THE AIRING OF THESE QUESTIONS WHICH THESE HEARINGS WILL CONTINUE TO PROVIDE.

## OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator **Grassley**. This is the third day of hearings on the subject of constitutional restraints on the judiciary—specifically, the authority conferred on Congress by article III of the Constitution to make exceptions in Federal court appellate jurisdiction.

The subcommittee looks forward today to continuing its important discussion on the role of the Federal judiciary and Congress function to participate in defining that role.

Article III of the Constitution sets up the judicial branch of Government. In section 2 of that article, the framers of the Constitution listed the original jurisdiction of the Supreme Court—those cases and controversies which the Supreme Court must always have the authority to decide.

Then the Constitution goes on to state:

> In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

On its face, this language authorizes the Supreme Court to hear cases on appeal from State courts unless Congress decides to "make an exception" in that power in order to leave jurisdiction over cases to those State courts.

In other words, the Congress could decide which disputes would be settled in State courts without an appeal.

In the wake of several controversial Supreme Court decisions which have nationalized important legal disputes, Congress has been repeatedly petitioned to use the exceptions clause to return these issues to the States for resolution.

The subcommittee does not intend today, however, to explore those various controversial cases which have prompted bills implementing the exceptions clause. Today, our objective is to examine the historical roots of this language in the Constitution and to explore the subsequent statements by the courts and legal scholars which have added to the meaning of the exceptions clause.

As an introduction, I would just like to read a brief passage from the Federalist Papers that give a fitting preface to our hearing today.

Alexander Hamilton stated, in response to those who feared the authority of the Federal judiciary in the new Constitution:

> If some partial inconveniences should appear to be connected with the incorporation of any of—the powers of the Federal judiciary—into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.

That is from Federalist Paper No. 80, and the emphasis on the word "exception" was in the original text of Alexander Hamilton's writing.

This gives us some insight into the importance the framers of the Constitution attach to this clause.

I would want to add as well, however, that the subcommittee will inquire into the limits on this authority.

The Constitution itself contains no limits on this power to set the conditions for leaving jurisdiction to State courts, but we all realize that the Constitution must be read as a unified document with some phrases implying limits on others.

Clearly, today's hearing will add important insights to a question of utmost significance to future relations between the Congress and the Federal courts in the national Government and between the State courts and the Federal courts in the judicial system.

At this point I would like to invite our first witness, Prof. Jules Gerard, to the witness stand.

As our first distinguished witness on a day when we shall hear from four legal scholars, the subcommittee is pleased to welcome Professor Gerard, professor of law at Washington University in St. Louis, Mo.

Professor Gerard is particularly noted for his scholarship, including many writings on the general subject of judicial accountability.

The subcommittee is particularly grateful that you have come so far, Professor, to give us the benefit of your views of constitutional studies on this topic.

Before you begin, I would like to inform you and the other witnesses that your entire statement—as is customary—will be included in the record. Accordingly, we would appreciate your efforts to summarize your writings into a brief oral presentation. This will give us more time to explore your thoughts with questions and a two-way discussion.

Let me say that, where Senator Hatch is very diligent about keeping people on time, I have not been. Then, usually, when the hour has fleeted from us, I realize that I should have been very careful at the beginning. So I hope I can be a little more diligent, or at least as diligent as Senator Hatch, in seeing that things are kept on schedule for the benefit of people who are on the tail-end of the program.

I only say that as a reminder to myself—not that there is any inference that you would abuse it, because I am sure that none of the witnesses will, but I have not been very diligent myself.

Professor, we would appreciate it if you would start at this point.

## STATEMENT OF JULES GERARD, SCHOOL OF LAW, WASHINGTON UNIVERSITY, ST. LOUIS, MO.

Mr. GERARD. Thank you, Senator Grassley.

I believe the extent of Congress' power under article III to make exceptions to the appellate jurisdiction of the Supreme Court and to define the jurisdiction of the other Federal courts is, on the whole, reasonably clear.

Having said that, I think we must face the fact that it is impossible to predict the behavior of the Supreme Court today. It is a court without allegiance to principle, except to the principle of being unprincipled. It regularly substitutes sophistry for logic, obfuscation for explanation, and personal predilection for reasoned analysis in its opinions in which day becomes night and up means down. What it delivers in many cases are peremptory edicts rather than persuasive judgments.

Moreover, it is a court without any discernible sense of the constitutional limitations on its own power.

Forty-five years ago, protesting the Court's invalidation of a law of Congress, Chief Justice Harlan Fiske Stone reminded his brethren that, "courts are not the only agency of government that must be assumed to have capacity to govern." That truism would be considered rank heresy by the Court today, if one may judge from its behavior.

The point of all of this is simply to say that the witnesses who appear before you--all we can do is give you an opinion about what the answer ought to be with respect to Congress' imposing restrictions on judicial jurisdiction. No one can make a prediction about what the Supreme Court's answer to such a question will be.

## THE "ESSENTIAL FUNCTIONS" THEORY

Some witnesses before you have testified concerning the "essential functions" theory. For the past 25 years or so, academics have asserted that there are implied limitations on Congress' power to make exceptions and regulations of Supreme Court appellate jurisdiction.

They assert that the power cannot be exercised in such a way as to interfere with what they call the "essential functions" of the Supreme Court. There are many insurmountable problems with this claim.

In the first place, it is totally unsupported by constitutional text and history, as Prof. William Van Alstyne documented in his statement submitted to the subcommittee at an earlier hearing.

In the second place, it is flatly contradicted by dozens of Supreme Court opinions.

In the third place, to the extent that their conclusion is based upon resolving conflicting interpretations of the Constitution, it simply flies in the face of history because, until 1914, the Supreme Court had no jurisidction to review State court judgments which upheld constitutional claims, no matter how wrong the State courts had been in interpreting the Constitution.

Finally, the argument in support of this claim invokes the rhetoric of checks and balances, but it ignores the obvious truth that the exceptions provision of article III is itself one of those very checks.

It surely is ludicrous to argue that the system of checks and balances can be maintained only by reading out of the Constitution the only explicit check on the judiciary that the framers deliberately put there.

In short, there is nothing to be said in support of this essential functions theory. It does provide a handy smokescreen for those who distrust democracy to hide behind.

The question before this subcommittee is: Does the Constitution put in the hands of the representatives of the people a check on the power of the judiciary?

Those who favor government by appointed judges over government by elected representatives quite naturally prefer to talk about constitutional obscurities rather than confess openly their doubts about the competence of the people for self-governance, but democratic government is the issue before the subcommittee.

### LIMITATIONS ON CONGRESSIONAL POWER

Nevertheless, there is a grain of truth in this checks and balances concept that needs to be explored, and that is based upon the very significant difference between judicial review of activities of the Federal Government—Congress and the Executive—on the one hand and review of the activities of the States on the other.

I believe it is arguable that Congress could not legitimately enact some substantive measure and simultaneously deprive the courts of jurisdiction to review it for constitutionality.

Were it otherwise, Congress could defeat the judicial check on Federal legislative and Executive power that I think the framers intended, and to this very limited extent I think it is arguable that there is an implied limitation on Congress' power that must be deduced from the structure of the Constitution.

But even if Congress lacks the power to immunize Federal legislative and Executive activity from constitution review by Federal courts, it by no means follows, as some of your witnesses have argued, that Congress is likewise powerless to immunize State legislative and Executive activity.

The checks and balances of the Constitution are of two kinds. One kind provides checks and balances between the three branches of the Federal Government, and that is the kind which gives rise to the implied limitation of Congress' inability to immunize Federal activity from judicial review.

The other kind consists of those between the Federal Government and the States. The Constitution provides Congress with many mechanisms to check State governments—the Commerce clause is one; the power under article III to subject State court judgments to Federal court review is another—but—and this is the point—the Constitution does not compel Congress to employ them if it chooses not to do so.

A second real limitation on Congress power concerns the nature of the courts which are given jurisdiction to review governmental activities.

Article III requires that the judicial power of the United States be vested in courts whose judges enjoy lifetime tenure and a guarantee against reduction in compensation while they are in office. These are known as article III courts.

Thus, it would be impermissible for Congress to create a so-called legislative court whose judges are without those guarantees and give it the ultimate power to rule on the constitutionality of its own acts.

Likewise, it would be impermissible for Congress to give such a court the ultimate power to review judgments from State courts.

A third category of limitations on Congress power arises from other provisions of the Constitution. To use the example that everybody uses, Congress could not legitimately deny jurisdiction to the Federal courts to hear cases brought by blacks, for instance. But limitations of this kind need not detain us for no one has suggested anything so repugnant as that.

To the extent that provisions outside article III bear on hypothetical proposals, I consider them at appropriate points.

Except for these three limitations, Congress power to make exceptions to and regulations for the appellate jurisdiction of the Supreme Court and to define the jurisdiction of other Federal courts would seem to be plenary. That has been the uniform interpretation of article III by the Supreme Court throughout our history and is the view supported by the constitutional text and structure.

I have divided my discussion of this matter into three parts, depending upon whether the proposed exception to jurisdiction was stated in terms of: one, the court that rendered the judgment; or, two, the nature of the case; or, three, the nature of the remedy.

First, as to the nature of the court that rendered the judgment. I am persuaded that Congress could, if it chose to do so, deny jurisdiction of all Federal courts to review State court judgments ruling on the constitutionality of State statutes and Executive activities. The claim that the essential functions theory imposes a limitation on this power is simply unconvincing, for the reasons given earlier.

If State courts can be given the final word on constitutional questions arising under State laws, then the question might arise, why cannot they be given the final say on questions arising under Federal laws?

The answer, I believe, is that the framers intended that the judicial check on Federal legislative and executive power come from the Federal judiciary, which is protected by lifetime tenure and against reductions in compensation and not from that of the States.

Second, as to the nature of the case. That Congress has the power to deny jurisdiction to Federal courts to hear or review cases that are defined by their subject matter is well settled.

Thus, for instance, Congress for more than 100 years denied the Supreme Court power to review State court judgments that upheld Federal constitutional or statutory claims, and it has always imposed restrictions such as jurisdictional amount on access to other Federal courts.

With respect to State court judgments concerning State laws and activities, this power would seem absolute, for if Congress may, as I believe, deny Federal appellate jurisdiction over all such State court judgments, it surely may deny it over some.

The single qualification is that the classification of cases denied review must not violate some other nonarticle III provision of the Constitution.

Some of the witnesses who testified earlier suggested that denying jurisdiction to review State court judgments with respect to State abortion statutes, for instance, might violate equal protection. The merit of that argument—if it has any—eludes me.

The exceptions provision, like the Commerce clause, is a plenary power of Congress to be exercised at its discretion. Invoking equal protection analysis is simply a devious way of arguing that Congress may draw no lines at all between the subject matter of cases in the granting or withholding of jurisdiction. One may just as well argue that Congress violated equal protection when it prohibited the interstate shipment of lottery tickets but not of bingo cards.

The point is that persons are guaranteed equal protection, not lawsuits.

I suppose it is possible for one with more imagination than I to hypothesize a situation in which the nature of the case is so inextricably tied to some other characteristic which is an impermissible basis for classification under equal protection, like race, as to invalidate the whole law withholding jurisdiction, but school prayer and abortion, which are the main bones of contention, do not fit that description.

Third, as to the nature of the remedy, Congress has the power to limit the remedies which are available in the Federal courts, and that is well settled.

Congress frequently has exercised that power—in labor and tax injunction cases, to name only the better known examples.

Again, the power is plenary, with one possible exception. The possible exception is that it may be conceded, for purposes of argument, that Congress may not deny a remedy which is the only effective means available to a litigant to redress an unlawful violation of rights. The question usually debated today is busing of schoolchildren.

The difficulty raised by this example is in drawing the line between a remedy and a right. The right announced in *Brown* v. *Board of Education* was the right to be free from intentional segregation. Clearly, there may be cases in which the only reasonable means available to desegregate an intentionally segregated school district is by busing. In those situations, denying the remedy perhaps would be invalid.

Whether we have crossed the line to a position in which the right is no longer to freedom from deliberate segregation but, rather, is a right to an integrated education, I confess, I do not know. If we have, then denying the remedy of busing may be impermissible in all cases.

On the other hand, if the right still is that of being free from intentional segregation—and I believe that is what the right should be—then denying the remedy would be legitimate, except perhaps in the situation in which it is the only effective remedy available.

### SUGGESTED RESTRICTIONS

Congress may wish to consider limiting the availability of specific remedies in a number of ways, and I have two suggestions.

It could, and I think should, deny all courts—State and Federal—the power to enjoin limitations which Congress has imposed upon the expenditure of Federal funds until such time as the Supreme Court either has ruled on the constitutionality of the limitation or has finally refused to review the lower court judgments. This would avoid the spectacle of cases like *Harris* v. *McRae* in which Federal funds were illegally dispensed by district court order for 2 years.

Second, Congress may also wish to consider depriving all Federal courts of jurisdiction to issue any writ—including habeas corpus—which collaterally attacks judgments of State courts and, at the same time, deprive the Supreme Court of jurisdiction to review State court rejections of collateral attacks.

The problem I have in mind here consists of State criminal convictions, especially death penalty cases, which now go on virtually forever.

Two issues need to be addressed with respect to this suggestion. First, such a measure would not preclude direct Supreme Court review of the conviction by a appeal or certiorari, but it would require the Court to consider the judgment at that time and not permit it to wait for the collateral attacks to begin, as it does at present.

It would, moreover, require the attorney for the defendant to muster all of the arguments in the defendant's favor at one point in time, and it would, finally, remove an enormous amount of frivolous litigation from the overburdened Federal courts.

Second, such a statute definitely would not violate the article I, section 9 prohibition against suspending the writ of habeas corpus. Habeas corpus still would be available from Federal courts for Federal detainees and from State courts for State detainees. In no sense would the writ be suspended.

I would like to make one final statement on this question of denying review to State court judgments. There are some, including some witnesses before this subcommittee, who argue that only Federal judges can be trusted to protect the Federal constitutional and statutory rights of the people.

I consider such arguments to be gratuitous slurs upon the ability, dedication, and integrity of State judges and unworthy of any consideration whatever. To elevate such vituperation to a constitutional presumption, which is what its proponents are advocating, is simply unthinkable.

## WHETHER CONGRESS SHOULD EXERCISE ITS POWER

Except for these two suggestions which I endorse, I have so far focused on congressional power without adverting to whether that power should be exercised.

I share Prof. Van Alstyne's concern that Congress not establish a precedent of reacting in pique to every Federal court opinion with which it disagrees by enacting a new set of restrictions on jurisdiction, but I am perhaps less bothered than he about whether action that Congress takes at this time could be considered such a precedent.

Since just before the turn of the century, there have been two periods during which the Supreme Court, by ingenious, implausible, or just plain outlandish misconstructions of the Constitution, has interfered endlessly with democratic government by imposing its view of desirable social policy upon the people of this Nation.

The first such period extended from 1897 to 1937. This 40-year stretch is known to generations of constitutional law students as the Lochner era, after the infamous decision in *Lochner* v. *New York.*

Although there can be some disagreement about when the second period began—and many would put it earlier than I do—I place it in 1965 with the decision in *Griswold* v. *Connecticut.* We still are in that period, and no end is in sight.

Thus, for 56 of the last 84 years, or for exactly two-thirds of that whole span, we have had government by an unchecked, unaccountable, antidemocratic judiciary. It is difficult for me to view an attempt to do something about that situation at this late date as an impulsive fit of pique.

The claim that amending the Constitution is the proper remedy for bad decisions is not a legitimate response. That requires super-majorities at every stage of the process. But why should society have to shoulder the burden of mustering super-majorities to overturn decisions like the abortion and death penalty cases, decisions without even a semblance of an anchor in the language, structure, or history of the Constitution?

Amending the Constitution was designed to provide for unanticipated changes in our society, not to be a corrective for abuses of judicial power.

Furthermore, resorting to the amendment process lends an aura of respectability to such decisions that they on no account deserve. It implies that the problems are created by the Constitution instead of by judicial usurpations of legislative power, and regular resort to the amending process is bound to encourage rather than discourage misbehavior by courts.

Personally, I do not favor restrictions that would give State court judges the final word on any constitutional question. There is a real value to interpretations of the Constitution that are uniform throughout the land. Also, I am inclined to agree with Mr. Justice Oliver Wendell Holmes' remark: "I do not think the United States would come to an end if we—the Supreme Court—lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."

Moreover, it is possible that the practical consequences of enacting such restrictions would be counterproductive. At least some of these cases now are brought in State courts. Would not an act denying the Supreme Court jurisdiction to review these State court judgments tend to induce more litigants to file in the lower Federal courts in the first place, thus amplifying the problem instead of diminishing it?

Nevertheless, having said that, chaos is chaos whatever its source. I know of no calculus by which an objective determination can be made that one form of anarchy is better than another.

I cannot prove, for instance, that the situation would be any more confusing if 50 State supreme courts were ruling on what a constitutional death penalty statute requires than it is at present, with only one Supreme Court, and I certainly could not say that a person who preferred that kind of chaos to the kind we now have was being irrational.

Finally, I understand the exasperation and the despair of those who simply are fed up with the imperial judiciary. The situation is intolerable. Any step, however small, in the direction of alleviating the situation is to be welcomed.

Some of those steps clearly are possible if Congress will exercise its constitutional power to regulate and make exceptions to the jurisdiction of the Federal courts. They may be the only steps that are available to a simple majority of the people. Whether any of them, on balance, requires too high a price is a matter that we, the people, must leave to the consciences and discretion of you, our elected representatives.

Thank you.

Senator GRASSLEY. Thank you, Professor Gerard.

You have made a careful study of the potential limits of article III exceptions authority, and, of course, it goes without saying that the subcommittee appreciates your addition to that aspect of our inquiry.

Your statement made a point that no other witness has yet explored. If I understand you correctly, you contend that the Congress could not use the exceptions clause to prevent Federal courts from reviewing congressional statutes for constitutionality, but Congress, on the other hand, has plenary power to prevent Federal courts from reviewing cases growing out of State laws. Is that correct?

Mr. GERARD. Essentially, yes. I do not contend that it is settled that Congress could not immunize its own activities from Federal court review. I tend to believe that that is a correct interpretation, but I do not think it is settled. I think it is an arguable point.

With respect to the second part—yes, I believe without any doubt that Congress has plenary power to prohibit Federal courts from reviewing State court judgments about State laws and State activities.

Senator GRASSLEY. Some of our other witnesses would probably react by saying that when a constitutional right is at stake, access to the Federal courts should not be denied to anyone or depend upon whether the right is threatened by a State or Federal statute.

I would like to have you say how you would respond to that sort of reaction to what you said.

Mr. GERARD. First, I would respond historically: It is quite clear that the Constitution did not require the creation of inferior Federal courts. That was left to the discretion of the first Congress.

The Framers of the Constitution quite clearly intended—and there can be no doubt about this whatever—that State courts would, in most cases, be the courts of first instance to rule on questions of constitutionality of State activity.

The so-called arising under jurisdiction—the jurisdiction given to Federal courts to review questions arising under the Constitution or laws of the Federal Government—was not vested in the lower Federal courts until late in the 19th century, so that for almost a century they had no jurisdiction; all those cases were in the State courts.

In the first place, then, I would say that it was quite clear historically that the framers intended the State courts to be the primary line of defense.

Second, the Constitution explicitly provides that the appellate jurisdiction of the Supreme Court is within the power of Congress to define, and the Supreme Court in scores of cases has held that the Constitution means exactly what it says: Congress has plenary power to control its appellate jurisdiction.

If you put those two things together, what they boil down to is that Congress can deprive lower Federal courts initially of all power to hear those cases and can, by exercising its power over the appellate jurisdiction of the Supreme Court, leave them where the Framers at least provided that they could be left, and that is with the State courts.

Finally, I would respond by saying that the view that the Federal courts are somehow more capable, somehow better qualified, to rule on constitutional questions of State laws is an argument without any evidence to support it.

I consider the implication contained in that kind of an argument about the dedication and the integrity of the State judges to be odious. It is unsupported by any sort of evidence. I believe there is simply no evidence at all that State court judges are more likely to sell their souls to the devil than the Federal court judges.

So I would respond that that does not really deny anybody anything. It provides that they have access to the courts. It simply leaves it up to the State courts to decide those questions.

Senator **GRASSLEY**. Thank you very much.

I am reminded of a corollary argument on whether we ought to have categorical grants or block grants now that the new administration has come in. You get the impression from those people who want to maintain the categorical grants that, quite frankly, all the humanitarianism that ever existed in American society rests right here in Washington, D.C., and that State legislators cannot be concerned about meeting the humanitarian demands of a Judeo-Christian American society.

Mr. **GERARD**. I think that view that is quite common in Washington.

Senator **GRASSLEY**. Yes.

Earlier witnesses have contended that the supremacy clause requires that the Constitution be interpreted identically nationwide. They argue that prospects of various interpretations of the Constitution from State to State would violate that supremacy clause. Is the exceptions clause ever in conflict with the supremacy clause?

Mr. **GERARD**. No. The supremacy clause says that the State judges shall be bound by the Constitution, treaties, and valid Federal law.

If it was the intent of the framers mandatorily to require that all State judgments be subject to review for uniformity by the Supreme Court of the United States, that would have been an odd way of using language in the supremacy clause. If that is what the supremacy clause had intended, the supremacy clause could have said that.

I think, as I said in my testimony, that there is a real value to interpretations of the Constitution that are uniform throughout the land. On the other hand, in cases such as the death penalty cases, we do not get a set of decisions by which we can discern any uniform principle anyway.

I am sorry, but I left something out there. It seems to me quite clear that article III left it up to Congress discretion exactly how to go about enforcing the supremacy clause. If Congress wishes to enforce the supremacy clause by subjecting State court judgments to review in the Federal courts, then it has the power to do so. If it chooses not to exercise that power, then it does not have to.

Let me give you an analogy to the commerce clause. The commerce clause makes Congress law with respect to commerce the supreme law of the land, yet I do not have any doubt that Congress could withdraw jurisdiction of the Federal courts to hear commerce clause cases if it chose to do so.

Senator **GRASSLEY**. Thank you for answering that question.

The next question is more philosophical. The term "exceptions" implies a larger rule. The larger rule would be in this case, I suspect, that the Supreme Court has full appellate powers when authorized by the Congress.

Nonetheless, due to the term "exceptions," does Congress strengthen its constitutional case for using its exceptions authority if it limits the use to a narrowly defined class of cases, like the prayer cases or the abortion cases, I presume?

Mr. **GERARD**. I think it would cause a great deal of consternation if Congress were to enact some kind of blanket—if Congress were to enact a law depriving the Supreme Court of all of its appellate jurisdiction, which is theoretically possible under the Constitution.

I do not agree with the argument that Professor Ratner, I think, made before the subcommittee in an earlier hearing—that the word "exceptions" cannot mean to except the whole thing, but that it must be used piecemeal for smaller areas.

On the other hand, I do think that if Congress were to enact a statute withdrawing all the appellate jurisdiction of the Supreme Court that would cause a great deal of consternation in the country, although I think it is theoretically within its power.

Senator **GRASSLEY**. That is the end of my questioning. Now the chairman of the subcommittee, Senator Hatch from Utah, has arrived.

Senator Hatch has a question, but I would also ask that he take over the chair so that I can go to another meeting.

Senator **HATCH**. I really appreciate your doing this. It has meant a lot to me.

Senator **GRASSLEY**. Thank you. Sometime I will be asking you to return the favor.

Senator **HATCH**. I would be happy to do it.

Senator **GRASSLEY**. Thank you.

Senator **HATCH**. Mr. Gerard, you mentioned three potential applications—as I understand your statement—of the exceptions clause—that is: abortion, voluntary prayer, and school busing.

For which of these might the case for using the exceptions clause be the strongest, and why? Or are all three equally strong?

Mr. **GERARD**. I think the easiest case is the school busing case because the line of authority is the clearest and has been upheld without any sort of qualification or equivocation with respect to Congress power to establish the remedies which Federal courts are empowered to grant.

The school busing situation is a situation in which Congress would simply be denying a remedy rather than defining a case by the subject matter in denying jurisdiction over it.

So I think the argument there has a little more strength than the argument with respect to school prayer and with respect to abortion.

Senator HATCH. I appreciate it. As always, we enjoyed having you before the subcommittee, and we appreciate the efforts you have made to present your eloquent statement to the subcommittee. I am sorry that I missed the first part of it, but I unavoidably had to miss it. We appreciate having you before the subcommittee.

Mr. GERARD. Thank you, Senator.

Senator HATCH. Thank you, Professor. Without objection, your prepared statement will be inserted in the record at this point.

[Material follows:]

## PREPARED STATEMENT OF JULES B. GERARD

My name is Jules B. Gerard. I am a professor of law at Washington University in St. Louis. I am honored to be invited to testify before the Subcommittee.

I understand that the hearing today regards the general question of congressional power under Article III to make "exceptions" to the appellate jurisdiction of the Supreme Court, and to the jurisdiction of other federal courts, and is not focused on any specific proposal. I have prepared my testimony with that understanding.

### I. Introduction.

I believe the extent of Congress' power under Article III to make exceptions to the appellate jurisdiction of the Supreme Court, and to all jurisdiction of other federal courts, is, on the whole, reasonably clear -- clear from constitutional language, structure and history, and from prior Supreme Court decisions. Nevertheless, we must face the fact that it is impossible to predict the behavior of the Supreme Court today. It is a Court without allegiance to principle, except to the principle of being unprincipled. It regularly substitutes sophistry for logic, obfuscation for explanation, and personal predilection for reasoned analysis in its opinions, wherein day becomes night, and up means down. What it delivers in many cases are peremptory edicts rather than persuasive judgments.

Moreover it is a Court without any discernible sense of the constitutional limitations on its own power. In protesting the Court's invalidation of a law of Congress 45 years ago, Chief Justice Harlan Fiske Stone reminded his brethren that "courts are not the only agency of government that must be assumed to have capacity to govern."[1] That truism would be considered rank heresy by the Court today, if one may judge from its behavior.

Thus, neither I nor anyone else can say with assurance whether any specific proposal to limit judicial jurisdiction will be upheld by the Supreme Court. All we can do is review constitutional language and structure, our national history, and prior Supreme Court decisions, and give you an opinion about what the answer ought to be, as distinguished from a prediction about what the answer will be. For no matter how many earlier Supreme Court decisions suggest that one or another limitation on judicial jurisdiction would be within the power of Congress to impose, and no matter how firmly rooted those decisions are in the text, structure and history of the Constitution, there can be no assurance that today's Court will acknowledge them as authoritative.

## II. The "essential functions" theory.

For the past 25 years or so, some academics have asserted that there are implied limitations on Congress' power to make "exceptions" and "regulations" of Supreme Court appellate jurisdiction. They assert that the power cannot be exercised in such a way as to interfere with what they call the "essential functions" of the Supreme Court.[2] There are many insurmountable problems with this claim.

In the first place, the claim is totally unsupported by constitutional text and history. Not only unsupported, it is flatly contradicted by those sources, as Professor William Van Alstyne so forcefully documented in the statement he submitted to this Subcommittee at an earlier hearing.[3]

In the second place, the claim is flatly contradicted by dozens of Supreme Court opinions, some of them written by Justices who were alive during the period of the Constitution's proposal and ratification. Reading some of the articles supporting this claim gives one the feeling of being a character out of Alice in Wonderland; not only did the Supreme Court never say what it meant in those opinions, but it invariably meant exactly the opposite of what it said.

In the third place, to the extent that resolving conflicting interpretations of the Constitution is supposed to be one of these so-called "essential functions" of the Supreme Court, the claim flies in the face of our history. Until 1914, the Supreme Court had no jurisdiction to review state court decisions that upheld claims based upon the Constitution, no matter how wrong the state courts were in their interpretations of that document.[4] Only in these recent articles has it been "discovered" for the first time that Congress had acted unconstitutionally during that whole period of more than a century by not providing for such review.

Finally, the argument in support of the claim invokes the rhetoric of "checks and balances." But it ignores the obvious truth that the exceptions provision of Article III is itself one of those very checks. It surely is ludicrous to argue that the system of checks and balances can be maintained only by reading out of the Constitution the only explicit check on the judiciary that the framers deliberately put there.

In short, there is nothing to be said in support of the so-called "essential functions" theory of limiting the exceptions clause. The theory does, of course, provide a handy smokescreen that those who distrust democracy can hide behind. The question is: does the Constitution put in the hands of the representatives of the people a check on the power of the judiciary? Those who favor government by appointed judges over government by elected representatives quite naturally prefer to talk about constitutional obscurities rather than to confess openly their doubts about the competence of the people for self-governance. But democratic government _is_ the issue.

## III. Real limitations on Congress' power.

Nevertheless, there is a grain of truth in the checks and balances concept that needs to be explored. It flows from the significant distinction between judicial review of activities of Congress itself (and of the federal executive), and review of activities of states. I believe it is arguable that Congress could not legitimately enact some substantive measure and deprive courts of jurisdiction to review its constitutionality. Were it otherwise, Congress could defeat the judicial check on federal legislative and executive power that I believe the framers intended. To this limited extent, I think it is arguable that there is an implied limitation on Congress' power to make exceptions to jurisdiction that is to be deduced from the structure of the Constitution.

But even if Congress lacks the power to immunize federal legislative and executive activity from constitutional review by federal courts, it by no means follows that Congress is likewise powerless to immunize state legislative and executive activity.

The checks and balances of the Constitution are of two kinds. One kind provides checks and balances between the three branches of the federal government; that is the kind which gives rise to the implied limitation under discussion. The other type consists of those between the federal government and the states.[5] The Constitution provides Congress with many mechanisms to check state governments; the Commerce Clause and the power under Article III to subject state court judgments to federal court review, among others. But, and this is the point, the Constitution does not compel Congress to employ them if it chooses not to do so.[6] To be sure, the Supremacy Clause binds state judges to abide by the Constitution, treaties and valid federal laws. But the exceptions provision of Article III plainly leaves it up to Congress to decide whether to enforce the Supremacy Clause against the states by requiring that their judicial judgments be reviewed in federal courts.

A second real limitation on Congress' power concerns the nature of the courts which are given jurisdiction to review governmental activities. Article III requires that "the judicial power of the United States" be vested in courts whose judges enjoy lifetime tenure and a guarantee against reduction in compensation while they are in office ("Article III courts"). Thus it would be impermissible for Congress to create a "legislative court" whose judges are without those guarantees and give it the ultimate power to rule on the constitutionality of its own acts. Likewise it would be impermissible for Congress to give such a court the ultimate power to review judgments from state courts.

These first two limitations on Congress' power may be summarized as follows:

As to federal legislative and executive activity, Congress arguably may not immunize them from judicial review for constitutionality. It may, in special circumstances, provide that the question initially come before a "legislative court," but the final judgment must lie with an Article III court, at least potentially.

As to state legislative and executive activity, Congress may, if it chooses, require that state court decisions about their constitutionality be reviewed by a federal court. But if it does so, the federal court must be an Article III court.

A third category of limitations on Congress' power arises from other provisions of the Constitution. To use the obligatory example, Congress could not legitimately deny jurisdiction to hear cases brought by blacks. But limitations of this kind need not detain us, for no one has suggested anything so repugnant. To the extent provisions outside Article III bear on hypothetical proposals, they are considered at appropriate points below.

## IV. The powers of Congress.

Except for the three limitations just discussed, Congress' power to make exceptions to and regulations for the appellate jurisdiction of the Supreme Court, and to define the jurisdiction of other federal courts, would seem to be plenary. That has been the uniform interpretation of Article III by the Supreme Court throughout our history, and is the view supported by the constitutional text and structure. In canvassing the ways in which Congress might choose to exercise its plenary power, I have divided the discussion into three parts, depending upon whether the exception to jurisdiction was stated in terms of (1) the court that rendered the judgment sought to be reviewed, or (2) the nature of the case, or (3) the nature of the remedy. As will become apparent, there is some overlapping between the categories.

(1) The court that rendered the judgment. I am persuaded that Congress could, if it chose to do so, deny jurisdiction of all federal courts to review state court judgments ruling on the constitutionality of state statutes and executive activities. The claim that the "essential functions" theory imposes a limitation on this power is unconvincing, for the reasons given earlier.

Whether Congress also could deny federal courts jurisdiction to review state court judgments ruling on the constitutionality of federal activities is a more difficult question. It is arguable, as I suggested earlier, that it is impermissible for Congress to immunize federal activities from judicial review for constitutionality by manipulating the exceptions provision of Article III. Thus the answer to this question may depend upon whether Congress has prevented the person who wishes to challenge the federal activity from bringing the suit in, or transferring it to, a federal court. If Congress has done so, then denying federal courts the jurisdiction to review the state court judgment would arguably be unconstitutional.

If state courts can be given the final word on constitutional questions arising under state laws, why can't they be given the final say on questions arising under federal laws? The answer, I believe, is that the framers intended that the judicial check on _federal_ legislative and executive power come from the _federal_ judiciary, which is protected by lifetime tenure and against reductions in compensation, not from that of the states.

Inside the federal system, as noted earlier, some provision must be made for every case within the definition of "the judicial power of the United States" to be heard, at least once, by an Article III court. If the initial judgment is rendered by a "legislative court," review by an Article III court is mandatory. But I am not aware that such far-reaching changes to the jurisdictional statutes are being considered. So I turn now to the question whether Congress may deny jurisdiction to federal courts to review some state court judgments that are defined by the nature of the case or of the remedy.

(2) _The nature of the case_. That Congress has the power to deny jurisdiction to federal courts to hear or review cases that are defined by their subject matter is well-settled.[7] Thus, for instance, Congress for more than 100 years denied the Supreme Court power to review state court judgments that upheld federal constitutional or statutory claims, and it has always imposed restrictions, such as jurisdictional amount, on access to other federal courts.

With respect to state court judgments concerning state laws and activities, this power seems absolute, for if Congress may, as I believe, deny federal appellate jurisdiction over all such state court judgments, it surely may deny it over some. The single qualification is that the classification of cases denied review must not violate some other, non-Article III, provision of the Constitution. Some of the witnesses who testified earlier suggested that denying jurisdiction to review state court judgments with respect to state abortion statutes, for instance, might violate equal protection. The merit of that argument, if it has any, eludes me. The exceptions provision, like the Commerce Clause, is a plenary power of Congress, to be exercised at its discretion. Invoking equal protection analysis is simply a devious way of arguing that Congress may draw no lines at all between the subject matter of cases in the granting or withholding of jurisdiction. One may as well argue that Congress violated equal protection when it prohibited the interstate shipment of lottery tickets but not of bingo cards. I suppose it is possible for one with more imagination than I to hypothesize a situation in which the nature of the case is so inextricably tied to some other characteristic which is an impermissible basis for classification under equal protection, like race, as to invalidate the whole law withholding jurisdiction. But school prayer and abortion, which are the main bones of contention, do not fit that description.

(3) The nature of the remedy. That Congress has the power to limit the remedies which are available in the federal courts also is well-settled.[8] Congress frequently has exercised that power -- in labor and tax injunction cases, to name only the better-known examples. Again, the power is plenary with one possible exception.

It may be conceded for purposes of argument that Congress may not deny a remedy which is the only effective means available to a litigant to redress an unlawful violation of rights. The example usually debated today is busing of school children. The difficulty raised by this example is in drawing the line between a remedy and a right. The right announced in Brown v. Board of Education[9] was the right to be free from intentional segregation. Clearly there may be cases in which the only reasonable means available to desegregate an intentionally segregated school district is by busing. In those situations, denying the remedy would be invalid. Whether we have crossed the line to a position in which the right is to an integrated education, irrespective of deliberate segregation, I confess I don't know. If we have, then denying the remedy of busing may be impermissible in all cases. On the other hand, if the right still is that of being free from intentional segregation, then denying the remedy would be legitimate, except in the situations noted above.

It is worth mentioning that the Supreme Court has in the past upheld schemes in which the only remedy left to the litigant was quite onerous. In Yakus v. United States,[10] for instance, it upheld a statute which required a litigant to challenge price control regulations in a special court located only in the District of Columbia and denied him the right to challenge the regulations in his criminal trial for violating them.

Congress may wish to consider limiting the availability of specific remedies in a number of ways. It could, and I think should, deny all courts, state and federal, the power to enjoin those limitations which Congress has imposed upon the expenditure of federal funds until such time as the Supreme Court either has ruled on the constitutionality of the limitation, or has finally refused to review lower court judgments. This would avoid the spectacle of cases like Harris v. McRae,[11] in which federal funds were illegally dispensed by district court order for two years.

Congress may also wish to consider depriving all federal courts of jurisdiction to issue any writ, including habeas corpus, collaterally attacking judgments of state courts, and depriving the Supreme Court of jurisdiction to review state court rejections of collateral attacks. The problem I have in mind consists of state criminal convictions, especially death penalty cases, which now go on virtually forever.

Two issues need to be addressed with respect to this suggestion. First, such a measure would not preclude direct Supreme Court review of the conviction by appeal or certiorari. But it would require the Court to consider the judgment at that time, and not permit it to wait for the collateral attacks to begin, as it does at present.[12] It would, moreover, require the attorney to muster all of the arguments in the defendant's favor at that time. It would, finally, remove an enormous amount of frivolous litigation from the overburdened federal courts.

Second, such a statute definitely would not violate the Article I, § 9 prohibition against suspending the writ of habeas corpus. Habeas corpus still would be available from federal courts for federal detainees, and from state courts for state detainees. In no sense would the writ be "suspended."

One final word on this question of denying review to state court judgments. There are some who argue that only federal judges can be trusted to protect the federal constitutional and statutory rights of the people. I consider such arguments to be gratuitous slurs upon the ability, dedication and integrity of state judges, and unworthy of any consideration whatever. To elevate such vituperation to a constitutional presumption, which is what its proponents are advocating, is unthinkable.

## V. Whether Congress should exercise its power.

Except for the last two possibilities, which I endorse, the discussion thus far has focused on congressional power without adverting to whether that power should be exercised.

I share Professor Van Alstyne's concern that Congress not establish a precedent of reacting in pique to every federal court opinion with which it disagrees by enacting a new set of restrictions on jurisdiction. But I am perhaps less bothered than he about whether action that Congress takes at this time could be considered such a precedent. Since just before the turn of the century, there have been two periods during which the Supreme Court, by ingenious, implausible, or outlandish misconstructions of the Constitution, has interfered endlessly with democratic government by imposing its views of desirable social policy upon the people of this nation. The first such period extended from 1897[13] to 1937.[14] This 40-year stretch is known to generations of constitutional law students as "The Lochner Era," after the infamous decision in Lochner v. New York.[15] Although there can be disagreement about when the second period began, I place it in 1965 (many would put it earlier) with the decision in Griswold v. Connecticut.[16] We are still in that second period, and no end is in sight. Thus for 56 of the last 84 years, or for exactly two-thirds of the whole span, we have had government by an unchecked, unaccountable, anti-democratic judiciary. It is difficult for me to view an attempt to do something about that situation at this late date as an impulsive fit of pique.

Impeachment is no answer. If Congress attempted to impeach every federal judge, or even every Supreme Court Justice, who abused his powers, it would have precious little time to do anything else.

Nor is the claim that amending the Constitution is the proper remedy a legitimate response. That requires super-majorities at every stage of the process. But why should society have to shoulder the burden of mustering super-majorities to overturn decisions like the abortion[17] and death penalty[18] cases, decisions without even a semblance of an anchor in the language, structure or history of the Constitution? Amending the Constitution was designed to provide for unanticipated changes in our society, not to be a corrective for abuses of judicial power. Furthermore, resorting to the amendment process lends an aura of respectability to such decisions that they on no account deserve. It implies that the problems are created by the Constitution instead of by judicial usurpations of legislative power. And regular resort to the amending process is bound to encourage rather than discourage misbehavior by courts.

Personally, I do not favor restrictions that would give state court judges the final word on any constitutional question. There is a real value to interpretations of the Constitution that are uniform throughout the land. And I am inclined to agree with Justice Oliver Wendell Holmes' remark:

> "I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[19]

Moreover, it is possible that the practical consequences of enacting such restrictions would be counterproductive. At least some of these cases now are brought in state courts. Wouldn't an act denying the Supreme Court jurisdiction to review these state court judgments tend to induce more litigants to file in the lower federal courts, thus amplifying the problem instead of diminishing it?

Nevertheless, chaos is chaos whatever its source. I know of no calculus by which an objective determination can be made that one form of anarchy is better than another. I cannot prove, for instance, that the situation would be any more confusing if 50 state supreme courts were ruling on what a constitutional death penalty statute requires than it is at present, with only one Supreme Court. And I certainly could not say that a person who preferred that kind of chaos to the kind we now have was being irrational.

Finally, I understand the exasperation, the despair of those who are fed up with The Imperial Judiciary. The situation is intolerable. Any step, however, small, in the direction of alleviating the situation is to be welcomed. Some of those steps clearly are possible if Congress will exercise its constitutional power to regulate and make exceptions to the jurisdiction of the federal courts. They may be the only steps that are available to a simple majority of the people. Whether any of them, on balance, requires too high a price is a matter that we, the people, must leave to the consciences and discretion of you, our elected representatives.

## FOOTNOTES

1. United States v. Butler, 297 U.S. 1, 87 (1936) (dissenting opinion).

2. E.g., Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960).

3. Van Alstyne, [Prepared Statement On] The Power Of Congress In Respect To The Appellate Jurisdiction Of The Supreme Court, pp. 11-24 (undated) [not yet printed].

4. See G. Gunther, Constitutional Law 63-64 (10th ed. 1980).

5. Cf. Baker v. Carr, 369 U.S. 186 (1962) ("political question" nonjusticiability can arise only in disputes between branches of federal government, not in disputes between the federal government and the states).

6. Except, perhaps, the Guarantee Clause ("The United States shall guarantee to every State in this Union a Republican Form of Government ...." U.S. Const., Art. IV, § 4.). But the Supreme Court has held this clause to be unenforceable by federal courts. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912). If the Court, for reasons of its own, can put state activity beyond constitutional review by federal courts without any semblance of constitutional authority to do so, why can't Congress, which has explicit authority, do likewise?

7. See C. Wright, Law of Federal Courts § 10 (3d ed. 1976) for a brief discussion.

8. See _id_.

9. 347 U.S. 483 (1954).

10. 321 U.S. 414 (1944).

11. 448 U.S. ___, 100 S. Ct. 2671 (1980)

12. See the opinion of Rehnquist, J., dissenting from the denial of certiorari, in Coleman v. Balkcom, 29 Crim. L. Rep. 4034, 4036 (1981).

13. The year Allgeyer v. Louisiana, 165 U.S. 578 (1897), was decided.

14. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), is usually cited as marking the termination of the period.

15. 198 U.S. 45 (1905).

16. 381 U.S. 479 (1965).

17. Roe v. Wade, 410 U.S. 113 (1973), was the first of the long line.

18. See Coleman v. Balkcom, _supra_ note 12, for the latest episode.

19. O.W. Holmes, Collected Legal Papers 295 (1920).

## SUPPLEMENTAL STATEMENT OF JULES B. GERARD

I submit this supplemental statement to the Subcommittee to respond to two comments by Mr. Cutler of the American Bar Association about my testimony of June 22, 1981.

It should be no surprise that the American Bar Association, an organization of lawyers (myself included), opposes any effort to restrict the power of courts. It is a matter of self-interest, pure and simple. The more power courts have to make social policy without regard to the democratic legislative process, the more power lawyers have to influence the making of that social policy directly.[1] Moreover, all judges are lawyers and many lawyers aspire to the bench, which gives them an additional reason to oppose measures that reduce the power of the judiciary. The fact of that self-interest should not be ignored when Congress is deciding how much weight to accord the testimony of the organized bar.

First, Mr. Cutler disputes my contention that Congress may withdraw cases challenging the constitutionality of state practices from the jurisdiction of the federal courts. His argument is that the Supremacy Clause of the Constitution mandates that such cases be heard by the Supreme Court. Yet the overwhelming majority of the Supreme Court's business is discretionary.[2] And the American Bar Association supports legislation that would enlarge even further the Court's discretion in selecting cases for review.[3] By what logic can the Supremacy Clause require Congress to permit Supreme Court review of challenges to state laws, while at the same time permitting the Court itself to refuse to hear those cases? If judicial review of state practices is mandatory, surely it must be mandatory for the Court as well as for Congress.

Moreover, Congress long ago closely approximated Mr. Cutler's position by granting appeals as of right from decisions upholding state laws against claims of constitutional privilege.[4] But the Court has persistently ignored not only what Mr. Cutler regards as a constitutional imperative, but the clear command of the statute as well.[5] There has been little pretense about this: almost thirty years ago Chief Justice Warren bluntly told the American Law Institute that "it is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari."[6]

Naim v. Naim[7] is perhaps the most notorious example of Supreme Court disregard of a mandatory appeal. In that case, which arose after Brown v. Board of Education,[8] the Court refused to review a Virginia decision upholding that state's antimiscegenation law against a constitutional challenge. The reasons the Court gave for refusing review were, in the judgment of Professor Herbert Wechsler, "wholly without basis in the law."[9] In addition to Naim and other cases disposed of on questionable procedural grounds,[10] there have been literally thousands of summary dispositions of mandatory appeals on the basis of the jurisdictional statement alone. In those thousands of cases, the appeal, which Congress attempted to make obligatory, and which, according to Mr. Cutler, the Constitution itself required, amounted to nothing more than a pro forma approval of the preceding decision. The so-called "appeal" "not only does not include a right to be heard orally but does not even include a right to have the case considered upon plenary briefs."[11]

How the Court's behavior can be squared with Mr. Cutler's interpretation of the Supremacy Clause is a mystery. Either Mr. Cutler's reading of the Supremacy Clause is mistaken, or the Supreme Court itself is a persistent violator of the Constitution.

Second, Mr. Cutler argued that, as a matter of constitutional law, interpretations of the Constitution must be uniform throughout the country, and, therefore, the Supreme Court must be given authority to resolve conflicts among the lower federal courts and the several state courts. But the Court's own rules do not require it to review conflicting decisions.[12] The plain truth is that the Court has permitted such conflicting decisions to stand, with the result that federal constitutional rights have varied among the states.

Cases involving the regulation of hair length by school officials are one example. These regulations were regularly challenged as violations of the constitutional rights of expression, of privacy, and of other species of substantive due process. A large body of case law developed in both the state and federal courts. By 1972, when the Supreme Court denied certiorari in Freeman v. Flake,[13] eight circuits had considered such cases: four had upheld the regulations[14] while four had overturned them.[15] Justice Douglas, dissenting from the denial of certiorari in another hair length case, complained, "The federal courts are in conflict and the decisions in disarray. We have denied certiorari where the lower court has sustained the school board and also where it has overruled them."[16] Despite the "deep and irreconcilable"[17] conflict over a recurrent issue, the Court maintained a Sphinx-like silence. In fact, the Supreme Court has not to this day given plenary consideration to a school hair length case.[18]

This behavior is difficult, if not impossible, to reconcile with Mr. Cutler's view that uniform interpretations of the Constitution are constitutionally mandated. As I made clear in my earlier statement, I agree that there is an important value in interpretations of the Constitution that are uniform throughout the land. But uniformity is only a value, not a constitutional command.

NOTES

1. For a study of how lawyers influenced social policy in a previous era of judicial hegemony, see B. Twiss, Lawyers and the Constitution (1942).

2. See generally, R. Stern and E. Gressman, Supreme Court Practice 36-51 (5th ed. 1978).

3. "Congresscan," 67 A.B.A.J. 704 (1981).

4. 28 U.S.C. 1257 (2) (1976).

5. See Gunther, The Subtle Vices of the "Passive Virtues" - A comment on Principle and Expediency in Judicial Review, 64 Columbia L. Rev. 1 (1964); Note, The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts, 63 Columbia L. Rev. 688 (1963).

6. Quoted in Wiener, The Supreme Court's New Rules, 68 Harvard L. Rev. 20, 51 (1954).

7. 350 U.S. 985 (1956).

8. 347 U.S. 483 (1954).

9. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harvard L. Rev. 1, 34 (1959).

10. E.g., Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Poe v. Ullman, 367 U.S. 497 (1961).

11. Hart, Foreword: The Time Chart of the Justices, 73 Harvard L. Rev. 84, 89 n.13 (1959).

12. Supreme Court Rule 17.1 states that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important

Senator HATCH. I would ask that my opening statement be placed in the record at the beginning of this record. Without objection, we will put it there.

Our next witness will be Mr. Edward I. Cutler of Tampa, Fla., who will represent the American Bar Association.

Mr. Cutler is a law partner of the ABA President William Reese Smith, Jr., and is himself chairman of the ABA's Special Committee on the Coordination of Federal Judicial Improvements.

We are pleased, Mr. Cutler, to have before us one who has contributed so greatly to the legal profession in so many years of service. We are anxious to hear your oral presentation and then discuss the ABA position.

Your written statement will be entered in the record, so if you can summarize we will appreciate that.

If you would, please go ahead and start your statement. The President is calling me, and I had better go chat with him. If you would start, maybe Senator Thurmond would take the chair.

## STATEMENT OF EDWARD I. CUTLER, AMERICAN BAR ASSOCIATION, WASHINGTON, D.C.

Mr. CUTLER. Thank you. We do appreciate this opportunity to appear before you.

I am sorry that you, as chairman of the subcommittee, must leave, Senator Hatch, but we are pleased that Senator Thurmond who chairs the full committee is able to be here as we present the views of the American Bar Association on this very important matter that is before you.

As I take it, the scope of this subcommittee's review at the present time is not limited to any particular bill or bills, but it is very hard to talk about constitutional issues without doing it in light of a congressional responsibility in holding hearings to consider pending legislation or proposed legislation. We are all aware of the pending bills which have brought about this hearing.

The chairman of the subcommittee of the House of Representatives dealing with these bills said that they pose a constitutional crisis.

Senator East, who chairs the Subcommittee on the Separation of Powers and has cosponsored such legislation, says that the Supreme Court has precipitated the crisis, and Senator Hatch, in introducing such legislation, has stated that the Federal judiciary has been courting constitutional disaster.

For that reason, it is important that we deal not only with the broad, general subject but also the kind of legislation that is under consideration.

As the subcommittee knows, the American Bar Association now represents half or more of all the lawyers in this country and they number as much as one-third of all the lawyers of the world. We believe we are committed to meaningful access to justice, and the Constitution is part of the access to justice which all of us in the legal profession believe must be furnished to the citizens of our country.

The committee I chair has, since 1971, dealt with this matter of the Federal judicial system. While those of us on the committee may have our individual views, we do not appear here—although we like the characterization of being legal scholars—as legal scholars, but we appear here only in stating the American Bar Association's position.

I must say that it would be hard to characterize the whole American Bar Association as being composed of legal scholars or even to say that the American Bar Association has studied the questions before you strictly as a matter of constitutional law, except to say that over the years the American Bar Association has had before it serious matters of challenges to the jurisdiction of the U.S. Supreme Court and of the lower Federal courts and in some instances has concluded that proposed legislation was unconstitutional on its face—ridiculously so, according to one statement.

Perhaps I ought to refer to two particular periods, just as Professor Gerard referred to particular periods in the Supreme Court's history. There were two particular periods in the history of this country, which are in the memory of Senator Thurmond and myself anyway.

I would like to go first to the period when the court packing bill was before the Congress in the era of 1936-37. At that time, there was a great deal of dissatisfaction in this country, mostly with our economic problem and with the Supreme Court's decisions rejecting various congressional efforts to deal with New Deal legislation.

At that time, a whole series of bills came before the Congress, not only to increase the number of Supreme Court Justices, as was proposed by President Roosevelt, but also to take away from the inferior Federal courts the right to declare any law unconstitutional, although reserving it under some bills to the U.S. Supreme Court.

One bill went so far as to say that if any district judge held that particular bill unconstitutional his office would be automatically, ipso facto, declared vacant. That is how extreme some of this legislation was in the 1936-37 era.

I can only tell you that the American Bar Association at that time strongly came out to reject that kind of legislation, in large part because it was considered unconstitutional but mainly because it was certainly against the policies of the organized bar and also those lawyers who were not part of the organized bar to have that kind of challenge made to the U.S. Supreme Court and the lower Federal courts.

I might add that the American Bar Association was much smaller then. A lot of people could have said it was a very selective group—self-selective—but in order to be sure that it was passing along to the country the views of the lawyers of the United States, the ABA conducted a poll, not only among the members but also among all of the known nonmembers of the American Bar Association.

They overwhelmingly took the position that such legislation should not be adopted. This was true of all classes of lawyers—rich, poor, country lawyers, city lawyers, members and nonmembers of the association, North and South alike.

That, by the way, was challenging a court that was largely Republican, and it was a largely Democratic legislature that was challenging the court.

The next time when the question came up seriously was in 1958. This was immediately after the Joe McCarthy era—the year after he died, in fact. At that time, there was a great deal of disaffection with Supreme Court decisions that dealt with people who were believed to be subversive.

Among the legislation being considered then were such laws as those affecting admission to the local State bars. If a lawyer or a prospective lawyer was challenged because he was a Communist or an alleged Communist, this legislation would have prevented the U.S. Supreme Court from dealing with the subject.

There were other instances—appearances of witnesses before congressional committees. If they were Communists or alleged Communists, there was the question of whether they could go to the U.S. Supreme Court for any kind of constitutional protection they sought.

There were five such kinds of legislation all in one bill, and there again the American Bar Association and the bars throughout the country overwhelmingly opposed such legislation.

That was in a different era. The Democrats, I guess, were in control of the Congress then. It was not a matter of economy but a matter of national security.

Now we are in a different era. This era has nothing to do with money; it has nothing to do with national security, but a disaffection, perhaps, with some of the social decisions of the U.S. Supreme Court.

Similarly, the American Bar Association takes the position that it would be wrong and improper to take away jurisdiction over those cases from the U.S. Supreme Court. I believe, although we have not reiterated this policy since 1936 or 1937, in August the ABA's House of Delegates will have before it the question of renewing its opposition to taking away such jurisdiction from the lower Federal courts as well.

As regards the question: What does the Constitution mean? we, as lawyers, all know that, as the courts say, a legislature cannot do indirectly what it cannot do directly. Certainly, it cannot directly say: "The U.S. Supreme Court is wrong, so we overrule it." By the same token, it cannot indirectly do it by saying in selective instances: "We will just take that jurisdiction away from the Federal courts and the U.S. Supreme Court."

We also say that, despite the broad language of the exceptions clause, the other provisions of the Constitution must likewise be considered, including the Bill of Rights and the rights protected in the Bill of Rights have to be taken into account in determining the broad language of the exceptions clause. If, indeed, the exceptions were enacted in such a way as to deprive citizens of their rights under the Bill of Rights, it would, in our view, be unconstitutional because of violating the Bill of Rights.

I would like, if I may, just to quote a few things that have been said in the past by the American Bar Association on the general issue because I do think that these are the kinds of things that live on.

The fact that they may have arisen in an era when there were economic problems facing the country—the New Deal was involved—or they may have come up in a period when national security was the overriding issue does not change these principles.

In connection with that 1958 period that I referred to, this is what they said:

> The integrity and uniformity of judicial review and the independence of the judiciary are vital to our system of government. If they are impaired, individual rights will be imperiled. Since maintenance of individual rights is the most notable distinction between our system and the Communist system, and the one on which we must rely to rally the hearts and minds of men to our cause, their impairment would also, in a broad sense, injure our national security.
>
> The bill would leave lower courts to make final decisions in the fields withdrawn from Supreme Court jurisdiction. We do not believe it sound to prevent review in the highest Court of such important questions. The lower courts may differ among themselves so that there may be great confusion in decisions. Resolution of such conflict is a historic contribution of review in the Supreme Court. It is difficult to conceive of an independent judiciary if it must decide cases with constant apprehension that if a decision is unpopular with a temporary majority in Congress, the Court's judicial review may be withdrawn.

The professor who just spoke did answer a question of the subcommittee about the matter of uniformity under the supremacy clause.

Our own view is that if you could have 50 different State court interpretation of the Constitution which would be final in their State—and, I should add, the same thing would be true of the District of Columbia, Puerto Rico, and Guam, and I have probably left out one or two other cases where the U.S. Constitution is supposed to prevail—that would completely abolish the supremacy clause. I think that ought to have been the answer that the professor would give.

With regard to the legislation that was introduced at the same time the Court-packing bill was introduced, the American Bar Association said in 1936:

> That the association disapproved all bills and amendments to the Constitution hereinafter mentioned in this report, the purpose or effect of which is to limit the jurisdiction or abridge the powers as they now exist of any federal court as at present constituted to pass upon the constitutionality of any law.

While I will not quote the rest of it—it is in my written statement—I think the American Bar Association can be quoted as saying overwhelmingly it has for years opposed efforts to withdraw on selective issues jurisdiction of the U.S. Supreme Court or of Federal courts.

There was a question addressed to the professor with regard to limiting withdrawals on such selective issues or broad, general withdrawal. I think if I were asked the question whether or not you could withdraw from the U.S. district courts all authority to grant injunctions of any kind, I might have to say that probably would be within your power, but when you do it on a selective basis and you are doing it indirectly simply to overcome a decision of the U.S. Supreme Court, that, to me, seems like an unconstitutional approach.

Just as a matter of policy, may I say that after all of the investigations in that 1936–37 era and 1958 era, wisdom prevailed and the Congress gave up on its efforts to take away jurisdiction from the courts.

We still look to the courts as the last bulwark of freedom in this country. As the ABA did say in 1937—and I did not know how many prior issues they were referring to—

> Many times in the past have the Federal courts been the subject of sporadic attacks. Each time they have been ultimately vindicated. Always their surest defense has been the sound judgment of the American people. Upon that judgment, properly informed and guided, dependence may still be placed.

I hope that this subcommittee's inquiries will result in guidance to this country not to tamper with the jurisdiction of the Federal courts.

Senator HATCH. Thank you, Mr. Cutler.

We are not today discussing the various ills that call for the use of the exceptions clause. As an illustration, however, I would like to consider, just for illustrative purposes, the abortion controversy.

Prior to 1973, as you know, there were different State policies relative to abortion. Those policies basically broke down into three groups, but even that is not the point of my question.

My point is that prior to 1973, for nearly 200 years, this Nation was not harmed or even unduly concerned about national uniformity on the question of abortion. Why, then, would you be deeply disturbed if States were free to interpret *Roe* v. *Wade* in ways that might allow some variation from State to State?

Mr. CUTLER. I would hesitate to take any position on a particular kind of legislation and say that on that particular legislation there should not be uniformity in interpreting the U.S. Constitution. I think it would be a mistake to select any subject.

It is true that the subject was not dealt with before this past decade, but that does not mean that it is any less an important subject on which there would be uniformity than all of the other subjects that were discussed in the many earlier years of the history of this country.

In my written statement I have referred to this: Suppose, for example, that the Congress should now decide that it does not like the U.S. Supreme Court's decisions on prior restraint on freedom of speech or freedom of the press? That has been a matter of serious controversy over the years.

So the Congress, perhaps because they have been battling with the press over a period of years, might say: "Well, we are just going to take that authority away from the courts." The freedom of the press ought to prevail.

We are talking about the Bill of Rights, and we are talking about the Bill of Rights as interpreted currently by the U.S. Supreme Court. It has changed its opinion in the past, and it may change it again.

Senator HATCH. Let me defer to the distinguished Senator, Senator Thurmond, the chairman of our full committee, who has some questions, and then I will follow up with a few more.

Senator THURMOND. Thank you very much.

We are very pleased to have you here and welcome you on this occasion.

I would like to pose this illustration: If the Norris-LaGuardia Act removes the injunction remedy in certain labor disputes, why could not the Congress remove the remedy in all cases arising out of State statutes authorizing voluntary prayer in school? All that would be affected would be one remedy among many, just as was done in the Norris-LaGuardia Act.

Mr. CUTLER. I could see it in the prayer cases more easily than I could see it in abortion cases because in abortion cases if injunctions were not permitted the case would become moot.

In the prayer cases, I cannot see the immediate injury that would be done, although there would be some injury done if the Court were later to decide that the particular prayer approach was wrong and should not have been permitted.

My problem is not with the withdrawal of jurisdiction; my problem is with the withdrawal of jurisdiction in order to change the decision of a court, and that is what we are dealing with.

We may, in this broad subject that is published as the purpose of this hearing, just be dealing with the subject broadly, but we are dealing particularly with issues that there is disaffection about.

There are large numbers of Members of the Congress and there are large numbers of persons in the United States who do not like the Supreme Court's decision on a particular thing who are therefore saying: "Let's change the rules with regard to that subject alone." On that, Mr. Chairman, we certainly would be opposed.

Senator THURMOND. What do you think those who wrote the Constitution had in mind when they wrote this portion of article III, section 2, subsection 2:

> The Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make?

Do you think those who wrote the Constitution had in mind there that the Congress would have the right to make exceptions?

Mr. CUTLER. Absolutely.

Senator THURMOND. If they made exceptions in matters and removed certain areas, do you feel that would be constitutional?

Mr. CUTLER. I think it would be constitutional unless it was done in such a way as to override another provision of the Constitution.

For example, the impairment of contracts clause is a section of the Constitution that must be observed. The Bill of Rights is a portion of the Constitution that must be observed. If, in taking away that jurisdiction, it would, in effect, be depriving a citizen of his protection under the Bill of Rights, then I say no.

Senator HATCH. But you could argue that in every case. With the expansion of the 14th amendment in recent years under a legislatively active Court, every time the Congress exercises its authority under the exceptions clause you could claim that Congress is tampering with something already decided by this activist Court.

Mr. CUTLER. I cannot give you the kind of illustration of "exception" that they might have had in mind. All I can say is that if you pick out some particular thing the U.S. Supreme Court had decided and say: "We don't like that any more, so we are just going to take that away from the jurisdiction of the Supreme Court," that does not seem to me to have been the intent of those who framed the Constitution and the Bill of Rights.

Senator HATCH. To the contrary, I think that was their intent. I think they were afraid of the usurpation of power by the Supreme Court. The question is: Is it wise to exercise that power? At least, that is what most of the authorities, I think, have brought before this subcommittee.

Mr. CUTLER. And I think that from the standpoint of the American Bar Association that is all that it has essentially done—said that it is unwise and against public policy to do it.

I still say, just, I think, as Justice Potter Stewart said a few days ago, there is a serious constitutional question still remaining if you select a particular subject and try to overrule the Supreme Court on that by taking the jurisdiction away from that Court.

Senator THURMOND. A few years ago, the Supreme Court injected the Federal Government into the question of insurance. The Congress immediately passed a law and took them out of that field. The word "insurance" is not found in the Constitution. This area has never been delegated to the Federal Government.

On the question of abortion, the word "abortion" is not found in the Constitution of the United States. The word "divorce" is not found in the Constitution of the United States. Up until recent years, that were not specifically delegated to the Union were considered to be reserved to the States. In fact, the 10th amendment provides that, I believe.

The Supreme Court went into the field of abortion and, in fact, wrote a law on the subject. What authority did the Supreme Court have to say that for the first 3 months a woman could abort for any reason, the next 3 months she could only abort if her health was in danger, and the last 3 months she could not abort at all? That sounds to me like they are writing a law on the subject, and that is the general impression, I believe, that has been considered.

What authority did they have to do that on a subject where they had no jurisdiction? As Senator Hatch said, for 200 years it was considered a matter for the States not the Federal Government.

We could pass a constitutional amendment or propose one to the States, and if three-fourths of the States voted for it, we could delegate the field of abortion to the Federal Government.

But we must remember that all powers not specifically delegated to the Federal Government in the Constitution or some amendments since the adoption of the Constitution, under the Constitution, are reserved to the States. I presume you would agree with that—that all powers not specifically delegated are reserved to the States?

Mr. CUTLER. Of course, I do, Senator.

Senator THURMOND. And since the field of abortion has never been delegated to the Federal Government, really, what authority did they have to go into that field?

Mr. CUTLER. Senator, I guess we could take lots of decisions of the U.S. Supreme Court—some which have since been reversed and some which reversed prior decisions—and make the same argument.

With regard to insurance, I think we could agree that insurance might be considered commerce and might be considered under the commerce clause—that the antitrust laws could be applied to insurance—and hence that under some provisions of the Constitution even insurance may be considered by the Congress as the proper subject matter of legislation.

We could take any one of the subjects you have discussed and say that these ought to be reserved to the States, and there is a good argument for many of them. The only point I can make is that if we do not like the U.S. Supreme Court's decision at a particular time, the American Bar Association says the way to change that is by constitutional amendment.

We do not take a position on the subject matter of any of these laws presently being considered.

Senator THURMOND. What gets me is why did the Supreme Court inject itself into a field where it has no authority to begin it, and why is the burden to be put on the Congress to reverse that decision when they were wrong in the first place in going into the field?

On insurance, the McCarran-Ferguson Act was passed in 1945 and reversed the action of the Court in injecting insurance at the Federal level, but that puts a burden on the Congress every time the Supreme Court goes into a field where it has no jurisdiction. The Congress has to pass an act to do it. Why does not the Supreme Court stick to the Constitution?

Mr. CUTLER. I am sure that whoever has lost a case before the Supreme Court said they did not stick to the Constitution and the ones that won said they did stick to the Constitution.

Senator THURMOND. I still believe that in recent years we have gone entirely too far. In the matter of commerce, for instance, I will give you an example.

There is an elevator boy working in a skyscraper that has a number of offices of businesses that do business in many States. I believe there was a judicial decision which held that this elevator boy was engaged in interstate commerce simply because he rode people up and down the elevator where the businesses on the different floor levels were engaged in commerce in different States. That is ridiculous.

Mr. CUTLER. I made that argument, Senator. I represented a window cleaner—I did not represent him; I represented the employer. They said that window cleaner in that kind of building, because of the decision about the elevator operator, was engaged in interstate commerce, so I lost.

Senator THURMOND. You lost, but you were right, were you not?

Mr. CUTLER. Well, I thought I was, but I found out I was not.

Senator THURMOND. It looks like the Court has been trying to find some way to go into every conceivable facet of people's lives and every conceivable subject, and that was not the purpose in the Constitution.

Mr. CUTLER. But, Senator, we are not talking about the present Court.

Senator HATCH. Let me just make this comment: The Senator is right. That was the reason they had the exceptions clause to begin with. They were afraid of a runaway Court.

I have just been rereading, for instance, Raoul Berger's very interesting book on government by judiciary. All I can say is that I think that is why we have the exceptions clause—just for this purpose—so that we can stop the Court from becoming the usurpating power of all Federal Government activity.

Frankly, the way they have expanded the 14th amendment beyond the intent of its authors is beyond belief. This has caused a lot of irritation in the Congress, which is supposed to be a coequal branch of Government, and which we all know is more powerful than the Judiciary but nevertheless never seems to be because of the ineffectiveness of some congressional actions.

I am not sure that I want to see the 14th amendment expanded for conservative purposes either but you ought to hear the liberals in society now moaning and groaning. For years they have stretched the 14th amendment to suit their purposes. Now, all of a sudden, when the conservatives want to use the liberal rulebook for the 14th amendment expansion game they consider it an awful abuse. I do have to admit that I see a great deal of humor in their protestations.

I, like you, am concerned about just how we use this 14th amendment process and how we use the exceptions clause. I also think Senator Thurmond is bringing up some pretty good points, and I cannot say that you have fully disagreed with him.

Mr. CUTLER. As I said, every case has to be decided separately on the facts of that case, even the constitutional facts. When I lose, I know my remedy, and maybe it is just to wait until we have a new Court.

But remember this: This same exercise that your subcommittee is going through now was an exercise that was done in 1936 and 1937 when we were dealing with an effort to avoid Federal legislation mostly and when the New Deal effort was being made, when there was a very conservative Court. Even then, it was argued that that Court had gone beyond its constitutional authority, and the same argument was made 22 or 23 years ago.

Senator THURMOND. I am going to have to leave to go over to the Senate. I want to thank you very much for your appearance here, and I believe down in your heart you think just like we do. Thank you. [Laughter.]

Senator HATCH. Let me just say this: What some Senators are trying to do today is considerably different than what FDR tried to do back in the 1930's.

Even so, rightly or wrongly, the Court was finding much of the legislation of the New Deal unconstitutional. After the Court-packing attempt, all of a sudden, they started to find that New Deal proposals were not unconstitutional but constitutional.

It may be that this is one of the contemplated results of the use of the exceptions clause that will only occur to restrain the Court from—should we say—extrajudicial activity if it is raised. For that reason, I am considering the merits of using the exceptions clause. At the same time I am not convinced we should expand the 14th amendment either way beyond what the intent really was of those who framed the 14th amendment.

As you know, that intent—at least I think—was much more narrow than what the Court has really decided or been deciding over the last 20 or 25 years.

We have appreciated your testimony. It is important that we know what the bar association feels in these matters. I think you have raised a number of very interesting and provocative issues in your statement and in the remarks that you have made here today. We are very grateful to have your testimony as part of this overall record on this very, very important issue.

Mr. CUTLER. May I have another moment?

Senator HATCH. Surely.

Mr. CUTLER. First, I have to answer Senator Thurmond although he is not here. Regardless of how I feel about the wording of the Constitution as a strict constructionist or otherwise, I must say that as far as public policy is concerned there has been no question in the past about the American Bar Association's position that it should not be exercised in the manner that is under discussion.

The second thing is that the ABA is going to have this topic on its agenda in the annual meeting this coming August at New Orleans. Besides the subject coming up again before the House of Delegates, our committee, joining with another committee of the association, is sponsoring what is called a showcase program, and we are hoping to have advocates from both sides of the controversy appear as panelists in that program.

Hopefully, some member of your subcommittee, Senator Hatch, will be able to be there. I think it has been difficult to make arrangements, but we are looking forward to someone being there to express both sides of this controversy.

It may well be that the American Bar Association could take a different position in August although its history is strictly the way I have stated.

Senator HATCH. I suggest that any bill using the exceptions clause must be a measured and careful approach. On the other hand, I do not think there is anything in the history or background of Founding Fathers' statements or precedents that would negate the right of Congress to use that approach, particularly with regard to the lower courts and probably, as most witnesses have indicated, even with regard to the Supreme Court.

Whether, under certain circumstances, it would be wise to do so or to exercise that power is a matter for debate, and my experience has been that there is always a very good debate on these major constitutional issues. Moreover, I am confident that reason generally does prevail in the Congress. We will just have to weigh all considerations at the conclusion of these hearings.

Again, we are grateful for your testimony. Without objection, your prepared text will be included in the record at this point.

[Material follows:]

## PREPARED STATEMENT OF EDWARD I. CUTLER

Thank you, Mr. Chairman and members of the Subcommittee, for this opportunity to appear before you to present the views of the American Bar Association on legislation to withdraw from the United States Supreme Court and the lower federal courts jurisdiction in selected matters. The Chairman of the Judiciary Subcommittee on Courts in the House of Representatives is quoted as saying that such bills "pose a constitutional crisis". Senator East, Chairman of your Subcommittee on the Separation of Powers and sponsor of such legislation, is quoted as saying that the Supreme Court has "precipitated the crisis." You, Mr. Chairman, have introduced such legislation and stated that "the federal judiciary has been courting constitutional disaster." This makes it fitting and important that the views of the organized bar be expressed.

My name is Edward I. Cutler, a practicing attorney from Tampa, Florida. I am here today as a representative of the American Bar Association, whose members comprise more than half of the legal profession in the United States and number one-third of all of the lawyers in the world. We are committed to the goal of assuring meaningful access to justice in this country. Our President, William Reece Smith, Jr., of Tampa, Florida, has asked me to express his regrets to the Subcommittee for his inability to be here personally. He considers the legislation and principles which you are addressing to be of the utmost importance.

The ABA's Special Committee on the Coordination of Federal Judicial Improvements, which I chair, has, since its creation in 1971, worked diligently toward improvement of such access to justice in the federal court system. Our Committee has, within its area of responsibility, many of the subjects falling within the jurisdiction of the Judiciary Committee and has over the years enjoyed a close relationship with the Committee, and various of its subcommittees. Today we limit our testimony to those portions of the legislation before you upon which our Association has, in accordance with its rules and procedures, articulated an official position.

The Association has, of course, always been devoted to upholding our constitutional system of government. Only last month, in his address on Law Day, U.S.A., Reece Smith reminded us that "we are a free people because we live in a society governed by the rule of law rather than the whims of the powerful", that the "Constitution and the Bill of Rights are the heart of that body of law," that "the greatest genius of the Constitution and the Bill of Rights lies in the balance they strike between order and liberty", and "just as we have a responsibility to make representative government work, we have a responsibility to see that the personal liberties guaranteed in the Bill of Rights are protected."

The number of proposals before the Congress to strip the federal courts of jurisdiction on various federal constitutional issues is constantly growing. They stem from substantial dissatisfaction with the courts. This dissatisfaction is expressed currently with decisions relating to abortion, busing, prayer in public schools and other public buildings, and male-only draft registration. Who knows what next? Legislative reapportionment? Admission to the practice of law? Perhaps even prior restraints on speech, assembly or the press? Our Association expresses no views at this time on the particular subject matters of any such legislation or on the decisions of the United States Supreme Court which have generated the pending bills.

However, our Association has long opposed changing constitutional jurisprudence through jurisdictional legislation. In 1958, when the Congress was considering legislation (the "Jenner-Butler Bill") to withdraw Supreme Court jurisdiction in certain matters,1/ the A.B.A. adopted a resolution which

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1/ The Jenner-Butler Bill, S. 2646 of the 85th Congress, dealt, among other things, with the following subjects, unrelated except that each arose from recent Supreme Court decisions involving alleged Communists: admission to the bar, proceedings before Congressional committees, executive security programs, state anti-subversive legislation, and teaching of Communism.

stated that, "reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of [such legislation] which would limit the appellate jurisdiction of the Supreme Court of the United States."

The 1958 resolution was based on a motion by John C. Satterfield (A.B.A. president 1961-1962), and on a report by the Association's Special Committee on Individual Rights as Affected by National Security. Its distinguished members included Ross L. Malone (A.B.A. president 1958-1959, a former U.S. Deputy Attorney General) who chaired the committee, and Whitney North Seymour (A.B.A. president 1960-1961). Every word of their reasoning is equally applicable today:

> The integrity and uniformity of judicial review and the independence of the judiciary are vital to our system of government. If they are impaired, individual rights will be imperiled. Since maintenance of individual rights is the most notable distinction between our system and the Communist system, and the one on which we must rely to rally the hearts and minds of men to our cause, their impairment would also, in a broad sense, injure our national security.
>
> The bill would leave lower courts to make final decisions in the fields withdrawn from Supreme Court jurisdiction. We do not believe it sound to prevent review in the highest Court of such important questions. The lower courts may differ among themselves so that there may be great confusion in decisions. Resolution of such conflict is a historic contribution of review in the Supreme Court. It is difficult to conceive of an independent judiciary if it must decide cases with constant apprehension that if a decision is unpopular with a temporary majority in Congress, the Court's judicial review may be withdrawn. (Emphasis added).

I should point out that, at that time, many distinguished members of the Congress, the Department of Justice, noted legal scholars, leading legal practitioners, and officials of state and local bar associations traversing the country, from the Association of the Bar of the City of New York and of the District of Columbia in the east, to the State of Washington in the west, including Edward L. Wright (A.B.A. president 1970-1971), similarly expressed their opposition to such legislation.

The organized bar did not participate in the extensive hearings held last year in connection with the Helms Amendment to S.450 of the 96th Congress. At that time the controversy was confined to the withdrawal of federal court jurisdiction over cases involving prayer in public schools and buildings. It was that bill, which died in the last Congress, that has spawned the many bills now at hand. Had we appeared at last year's hearings, we would have joined in the constitutional and policy objections which were so well presented at that time.2/

We remain as committed as ever to the same policy and, in connection with the pending bills, reiterate our strong opposition to such legislative restrictions upon the jurisdiction of the Supreme Court,3/ while reserving our right to challenge any of its decisions on the same or any other subjects.

Putting aside constitutional questions for the moment, the current bills should, at least as far as Supreme Court jurisdiction is concerned, be rejected as a matter of public policy. Supreme Court decisions interpreting the Constitution establish binding precedents, subject to alteration by the people through the process of constitutional amendment. The Framers provided in Article V a means of changing the Constitution and

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2/ As reported in the printed Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, Ninety-Sixth Congress, Second Session, on S. 450, Prayer in Public Schools and Buildings--Federal Court Jurisdiction, July 29, 30, August 19, 21, and September 9, 1980 (Serial No. 63).

3/ We do not oppose, in fact we have supported, as a "housekeeping measure" to be enacted by the Congress, reduction in the obligatory jurisdiction of the Court, which was the original objective of S.450, prior to the Helms Amendment. In its unamended form S.450 was supported not only by the American Bar Association but by members of the Supreme Court itself.

made it difficult to achieve. The "leaden-footed process of constitutional amendment," as Justice Frankfurter called it, requiring extraordinary majorities in Congress and among the States, was designed to make sure that transient majorities could not easily change our fundamental law. To utilize jurisdictional legislation so as to by-pass this "deliberately onerous" method of amending the Constitution ignores the concerns of the Framers.

We do not doubt the integrity of trial level judges, both state and federal, or their fealty to their oaths to uphold and defend the Constitution. However, to give them an unreviewable power to decide basic constitutional issues will inevitably lead to diverse local interpretations and practices under the Constitution, not only in our fifty states, but also right here in the District of Columbia, in the Virgin Islands, in Puerto Rico and in Guam, where our constitutional protections extend. And what would happen in a state with similar legislative authority over court jurisdiction if its legislature were to become dissatisfied with the way its highest state court judges decided such constitutional issues and were in turn to enact laws withdrawing those issues from the court's jurisdiction?

In the absence of review by the Supreme Court of the United States, the command of the Supremacy Clause that the Constitution be the "supreme law of the land" would in all events become a nullity. Since the adoption of the Judiciary Act of 1789, a constant feature of the history of federal court jurisdiction in this country, upon which the nation continues to depend, has been the review by the United States Supreme Court of state court interpretations on questions of federal constitutional law. Justice Holmes reminded us that a page of history is worth a volume of logic. The historical constancy of such Supreme Court review stands as a practically unanswerable argument against jurisdictional legislation of the kind that concerns us now.

With regard to the constitutional issue, the Association does not believe that the "exceptions and regulations" clause will bear the weight the proponents would put on it. That clause authorizes congressional structuring of federal jurisdiction, to be sure, but not without limit. To construe it the way the proponents would construe it is to make it the only power conferred on the Congress that is beyond the constraints of other provisions of the Constitution. The original Constitution was deliberately modified by the Bill of Rights to protect individuals against action which an oppressive majority might pursue under the original provisions of the Constitution. The First Amendment, the Fourth Amendment, the Fifth Amendment, and all other express prohibitions limit the power of Congress to legislate with respect to other constitutional powers which appear on their face to be unlimited. Examples are the broadly stated taxing and spending clause, the commerce clause and the postal clause, all of which are subject to the provisions of the Bill of Rights. The power of Congress to regulate and make exceptions to the appellate jurisdiction of the Supreme Court must similarly be limited.

A number of the pending bills would likewise attempt to eliminate the jurisdiction of the lower federal courts. Although the Association has not in recent years studied the legality and desirability of such legislation, it is doing so now. We anticipate that there will be an appropriate resolution before our House of Delegates in August and would hope that your Committee and the Congress will defer action on such legislation until the Association has had an opportunity to complete its study and make its current recommendations on behalf of the organized bar of this country. If your action is not to be deferred until then, we ask you to consider the record of the A.B.A. during the court-packing movement of 1936 and 1937.

The court-packing movement of 1936-1937 arose out of dissatisfaction with our country's economy; the Jenner-Butler Bill of 1958 arose out of dissatisfaction with measures taken against alleged subversives; the current movement arises out of general dissatisfaction with the Supreme Court's application of the Bill of Rights. All such dissatisfaction could breed permanent injury to our American system if we were to succumb to statutory circumvention of the proper way to amend the Constitution.

It was during the early years of the New Deal that President Franklin D. Roosevelt and his strong supporters in the Congress tried, through their proposal to change the majority views of the Supreme Court by enlarging the number of justices and through other legislation which would affect the powers of the federal court , to change their decisions on constitutional issues affecting the New Deal program. Seeking "to limit or change the power or jurisdiction of the Supreme court and the lower federal courts to deal with the constitutionality of Acts of Congress or of the state legislatures," they introduced a variety of some 30 bills on the subject. The bills fell into seven different classifications, those that would:

> (1) deprive all courts of the power to pass upon the constitutionality of an Act of Congress;
>
> (2) permit the Supreme Court to retain this power but in some fashion provide for a recall of decisions holding a statute unconstitutional;
>
> (3) require the concurrence of an extraordinary majority of the justices of the Supreme Court to declare an Act of Congress unconstitutional;
>
> (4) increase the membership of the Supreme Court;
>
> (5) deprive the lower federal courts of all power to declare an Act of Congress unconstitutional and vest that power with limitations exclusively in the Supreme Court;
>
> (6) provide for advisory opinions by the Supreme Court; and

> (7) provide for the popular election of judges.

One of the proposed acts would have ipso facto vacated a federal judge's office if he declared that act unconstitutional. Another would have prohibited a federal district court from enjoining the operation of a state statute until it had first been construed by the highest court of the state.

The Board of Governors and the Assembly of the Association unanimously disapproved such legislation. Following country-wide discussion of the pending proposals, the Association submitted to all of the known lawyers of the United States written polls with particular regard to the Supreme Court. All categories of lawyers from every section of the country, members and non-members of the A.B.A., rural and urban, senior lawyers and members of the Junior Bar, overwhelmingly supported the A.B.A. position against packing the Court.

The resolution which had been unanimously adopted by the Assembly read:

> That the Association disapprove all bills and amendments to the Constitution hereinafter mentioned in this report, the purpose or effect of which is to limit the jurisdiction or abridge the powers as they now exist of any federal court as at present constituted to pass upon the constitutionality of any law.

In that portion of the A.B.A. Committee's report commenting upon the efforts to take jurisdiction on constitutional questions away from the federal district courts, the point was made:

> The arguments against depriving the lower federal courts of the power to declare an Act of Congress unconstitutional are based upon considerations of practical justice. It is a long accepted concept of our jurisprudence that laws are to be construed and their validity determined in ordinary suits between private litigants. Granted the principle that an unconstitutional act is of no force or effect, it is difficult to understand why the humblest suitor should be repulsed from the ordinary court or should under a void legislative mandate be deprived of property or liberty, or suffer any irreparable wrong. Whenever constitutional

> questions are presented the controversy, if possible, is determined upon other considerations and always all doubts are resolved in favor of constitutionality.

Other witneses appearing before your Committee have from time to time commented upon the oath taken not only by federal judges but all officers to support the Constitution. You may be interested in the A.B.A. Committee's 1937 comment on this subject:

> The deprivation of the courts of the power to deal with unconstitutional legislation is the most insidious attack that can be made upon constitutional government. Specific amendments increasing federal power at least give notice of their purpose and permit of adequate consideration by the people. Emasculation of the courts means that all constitutional questions are remitted to Congress and the Executive. Theoretically, this does not imply the removal of all constitutional restraints. Congress and the Executive, as well as the judges, are bound by their oaths of office to observe and support the Constitution. Actually, however, they are frequently laymen unfamiliar with constitutional history and law. They move in a political atmosphere and are forced to act without the benefit of having presented to them specific cases, briefed and argued by competent counsel.

In our school days we learned indelibly the fundamental lessons of our representative democracy, the constitutional division of power among the three branches of government, the protections of the Bill of Rights, the relationship between the state and federal governments in our great country, and the teaching of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that the Supreme Court of the United States must be our last bulwark in the exposition of the law of the Constitution. The 1937 A.B.A. Committee's report concludes:

> Many times in the past have the federal courts been the subject of sporadic attacks. Each time they have been ultimately vindicated. Always their surest defense has been the sound judgment of the American people. Upon that judgment, properly informed and guided, dependence may still be placed.

Our job and yours is to see that the American people are properly informed and guided. Their sound judgment prevailed when the 1936-1937 court-packing movement was rejected. It prevailed in 1958 when the selective withdrawal of Supreme Court jurisdiction was rejected. Last year's rejection of the Helms Amendment was the result of sound judgment. The legislation now under consideration should be rejected on the same basis.

Mr. **Cutler**. There was a lawyer named Hatch. I think it was Vermont Hatch. Was he related to you, Senator?

Senator **Hatch**. I am sure he was.

Mr. **Cutler**. He was a New York lawyer who, in the 1936-37 era, spoke as chairman of the association of the city of New York Committee on Federal Legislation and was flatly opposed to any such change of the type being proposed.

Senator **Hatch**. He may not have been related to me. [Laughter.] He may have come from the other side of the family where they have had many mental difficulties. [Laughter.]

I am just kidding. It was nice to have you here.

Mr. **Cutler**. Thank you.

Senator **Hatch**. The subcommittee's next witness is Mr. Thomas Ascik from the nationally renowned Heritage Foundation.

Mr. Ascik has written many of the research papers for the foundation which have played an important role in the legislation considered here in Congress.

His study, "School Prayer and Federal Court Jurisdiction," gave considerable impetus to a jurisdictional removal bill last Congress that passed the Senate and came within a handful of Congressmen from satisfying an extraordinary requirement in the House which would have brought the bill up for a vote on the floor.

Mr Ascik, we are pleased to have you here today, and we welcome you before our subcommittee.

## STATEMENT OF THOMAS R. ASCIK, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. **Ascik**. Thank you, Mr. Chairman. Thank you for your kind invitation to appear here this morning.

In the interests of time, and since the relevant clauses of article III have been well read already this morning, I will jump to page 2 of my testimony and begin there.

The cases of the Supreme Court, particularly ex parte *McCardle*, have, on the whole, recognized and affirmed the power of Congress over the appellate jurisdiction of the Supreme Court.

I have done a short analysis of the more important cases, and I ask that it be included in the record at this time.

But this is not the best subject about which to ask the opinions of the Justices of the Supreme Court because it requires a recognition of a limitation on their powers for, as Alexander Hamilton said in Federalist 80:

> No man ought certainly to be a judge in his own case or in any case in respect to which he has the least interest or bias.

Additionally, clause 2 of section 2 of article III has not been frequently litigated, so there are few cases. Furthermore, there are also frequently dramatic differences between what the Constitution says and what the Supreme Court says the Constitution says.

For these reasons, the original intention of the clauses in question seems particularly relevant. I propose to discuss the meaning of the exceptions and regulations clause and, necessarily, of the separation of powers as they are expounded in the Federalist Papers. The original intention does, I think, contradict the conventional wisdom of the legal profession.

The dispersal of political power is one of the bedrock themes of our Constitution. The aggregate of powers is divided between two levels of government—State and Federal—and the Federal share is divided into three parts.

A fundamental distinction about these divisions of powers is that the powers of the three branches of the Federal Government are enumerated while the powers of the States, except for enumerated restrictions, are reserved, or, in other words, the Federal Government can exercise only specified powers while the States can exercise any powers they want except for specified restrictions.

With regard to the Federal Government, the three powers of Government—executive, legislative, and judicial—are separated from each other and each is exclusively assigned to a separate department—the executive department, legislative department, and judicial department.

This separating of the three fundamental powers of Government the Founding Fathers learned from Locke and Montesquieu. To them and, indeed, still for us, the reason was obvious.

As Madison said in Federalist 47:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

Several of the witnesses at the prior day of hearings urged the Congress not to exercise its constitutional powers over the appellate jurisdiction of the Supreme Court because such an exercise would jeopardize the independence of the Court.

The judiciary is not supposed to be completely independent; neither are the executive or legislative branches. The separation of powers does not mean that.

In the statement of Madison's quoted above, the key word is "all." The "very definition of tyranny" is the "accumulation of all powers, legislative, executive, and judiciary, in the same hands."

In the same essay—Federalist 47—Madison answers the objections of those who argue that the separation of powers under the proposed Constitution is not separate enough, that the three branches are not distinction, and that the powers are too "distributed and blended."

Madison answers by quoting and explicating the words of the inventor of the doctrine of the separation of powers, Montesquieu. This is a long quotation from Madison, in the middle of which is a quotation from Montesquieu:

> From these facts by which Montesquieu was guided, it may be clearly inferred that in saying, "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye—

and Madison was referring there to Montesquieu's scrutiny of the British constitution—

> can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

Madison goes on to show that not one of the State constitutions of his time provided for a separation of powers that was absolutely separate and distinct because such an absoluteness would be impossible and inexpedient given the nature of free government.

In the next essay, Federalist 48, Madison explains why the three branches of Government should not be wholly unconnected with each other. Instead, he contends, they should be connected and blended so as to give to each a constitutional control over the others. The reason is that power is, "of an encroaching nature." Madison meant all power—legislative, executive, or judicial.

The problem of the encroachment of power was solved, Madison explains in Federalist 51, by:

> So contriving the interior structure of the Government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

So the three branches are to keep each other properly in their places. No single branch is given the authority to keep the other two in place. Still less is one branch given the authority to decide the encroachment limits of its own powers. For, according to Federalist 49:

> None of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.

With regard to the judicial branch, the Federalists foresaw the least danger because the least amount of power had been given to it.

In his famous statement in Federalist 78, Hamilton explains:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in its capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

So, according to Hamilton, the judiciary has the least capacity from the very nature of its functions to be dangerous. Nevertheless, the Founding Fathers and the Federalists were too savvy to fail to realize that all power, even mere judgment, was dangerous.

The judiciary has the same possibilities for the abuse of power that the other two branches have. It can oppress the people, and it can be arbitrary.

In Federalist 47, Madison makes the words of Montesquieu his own in pointing out the dangers of the judiciary exercising the executive and legislative powers:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the Executive power, the judge might behave with all the violence of an oppressor.

In Federalist 48, Madison argues that very obvious and definite landmarks—and he is referring to case precedents there—would protect the country from projects of usurpation by the judiciary.

In Federalist 78, Hamilton warns of an arbitrary discretion in the courts. In order to avoid such arbitrariness, Hamilton maintains that it is:

> Indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.

If I might just interject here—it often seems that many of the champions of the legal profession cannot conceive of a project of usurpation by the Court, and I think that is one of our constitutional problems today, Mr. Chairman.

The checks on judicial encroachment possessed by the other branches are these: Congress appropriates money for the judicial branch; the President appoints the judges; the Senate confirms them; the House can impeach judges; the Senate would try the impeached judges; the Congress creates the inferior Federal courts; and, finally, and most importantly, by means of the exceptions and regulations clause the Congress has nearly complete authority over the appellate jurisdiction of the Supreme Court.

In Federalist 80, Hamilton defends the particular powers of the Supreme Court against those who fear its possible arbitrary discretion. He admits that the Court may force particular mischiefs on the country, but the solution would be obvious:

Quoting Hamilton: "If some partial inconveniences should appear to be connected with the incorporation of any of them"—that is, the particular judicial powers—"into the plan"—that is, the Constitution—"it ought to be recollected that the national legislature have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."

In Federalist 81, Hamilton seems to have the exceptions and regulations clause in mind when he says that, although the Legislature cannot reverse the decision of the judiciary, "it may prescribe a new rule for future cases."

Later in the same essay, he again emphasizes that the Supreme Court's appellate jurisdiction is subject to, "any exceptions and regulations which may be thought advisable."

Additionally, in discussing the Supreme Court's authority to review the facts of trial courts, Hamilton mentions that:

> The Legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no reexamination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception.

The judicial power is not absolute; it is not completely independent. Neither are the executive or legislative powers. The Constitution provides means whereby the executive and legislative powers may be kept in their proper places. Just so with the judicial power. The check on the appellate power of the Supreme Court is given to Congress.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Ascik.

On the floor this afternoon, debate will continue on the Helms school busing amendment. This is a funds limitation amendment. There has been considerable attention focused on the prospect of limiting Federal court jurisdiction with respect to mandatory busing.

Is the use of the exceptions clause to restrict remedies any different from restricting Federal court power to review State statutes?

Mr. ASCIK. If ever there were a project of usurpation, Mr. Chairman, it has been court-ordered busing.

The use of the exceptions and regulations clause would certainly regulate the Federal judiciary's power to review State court statutes, but the removal of one remedy would not prevent the Federal judiciary from reviewing the decisions of the supreme courts of States, in my opinion.

Senator HATCH. Sam Ervin once noted that the supremacy clause is addressed to State court judges and that Federal judges are not even mentioned.

He commented on this question of uniformity of opinions after making that observation by saying: "It may be on point that the supremacy clause requiring State judges to take an oath to support the Constitution was to get uniformity out of diversity."

Should we read the supremacy clause as requiring a single, uniform Federal law?

Mr. ASCIK. I do not think so. Professor Gerard already remarked upon this issue. One thing he did not say is that there are huge portions of the Constitution that provide for federalism; and federalism is, by definition, diversity.

So the supremacy clause is one clause of the Constitution, but the Constitution extensively provides for diversity, and the original plan of the Constitution is for a great deal of diversity.

I do not think the judiciary has really the authority from the Constitution to use the supremacy clause to force a homogeneity on the United States and every particular State.

Senator HATCH. Back to busing for a moment—what would be the advantage of simply removing lower court appellate jurisdiction and leaving open a direct appeal to the Supreme Court?

Mr. ASCIK. It would probably have the advantage of allowing the Supreme Court to hear many more imaginative remedies and solutions to desegregation than it gets to hear now, whereas the uniform powerful remedy is the massive bus transportation plan.

As you know, Mr. Chairman, we are in a new era of remedies whereby the old definition of remedies has been expanded and courts have come up with new kinds of remedies. I do not see why, even without the remedy of busing, the same kind of imagination could not be used.

Senator HATCH. As you know, some people are having difficulty in making the bridge between the expansion of the 14th amendment arguments and the article III arguments.

As I view it, article III vests in Congress the power to regulate the Supreme Court's appellate jurisdiction. In other words, Congress may decide which cases are left to State courts for final resolution.

The 14th amendment's enforcement clause, section 5, gives Congress the power to ensure due process is not violated.

I have reservations, as I have expressed, about using the 14th amendment in ways it was not intended to be used by its authors. As I mentioned earlier, Raoul Berger's book convincingly argues that the 14th amendment was limited to addressing the deprivation of due process rights to blacks.

I think we all would have to admit that the Supreme Court has stretched it far beyond that by its incorporation of the bill of rights into the 14th amendment, and I am not sure that Congress should fall into the same error.

The exceptions clause, however, is an explicit constitutional check on such judicial overstepping. This is perhaps a better way to address the problem of judicial legislating than by continuing to expand the 14th amendment albeit in a conservative direction. Do you agree or disagree with that approach?

Mr. ASCIK. I could not agree with you more about its explicitness. I know some of the previous witnesses on your previous days of hearings have remarked upon how little Congress has used it, but I think from some of your other remarks today, Mr. Chairman, you have pointed out that our situation now is unique and that the projects of usurpation by the Supreme Court are more advanced than they ever were before, and now might be the time to use an undoubted and explicit power of Congress.

Senator HATCH. Thank you, Mr. Ascik. We appreciate having your testimony as well today.

Mr. ASCIK. Thank you, Mr. Chairman.

Senator HATCH. Without objection, your prepared statement will be included in the record at this point.

[The prepared statement of Mr. Ascik follows:]

## PREPARED STATEMENT OF THOMAS R. ASCIK

"In Republican government the legislative authority necessarily predominates."—Madison in Federalist 51.

Mr. Chairman and members of the subcommittee, I am privileged by your invitation to address a few remarks to you this morning.

Let me begin by praising you for holding these hearings. The status and meaning of Article III of our Constitution is a fitting subject for extensive public debate.

Article III of the Constitution grants the Supreme Court an original jurisdication, that is, the authority to hear cases in the first instance, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party."

Article III also grants the Supreme Court an appellate jurisidiction, that is, the authority to review the decisions of lower courts "in all cases in law and equity arising under this Constitution, the laws of the the United States, and treaties made, under their authority . . . to all cases of admiralty and maritime jurisdiction . . . to controversies to which the United States shall be party . . . to controversies between citizens of different states...between citizens of the same state claiming lands under grants of different states . . . between . . . the citizens thereof (i.e of a state) and foreign states, citizens or subjects."

This appellate jurisdication, unlike the original jurisdiction, is subject to the legislative power, that is, to the Congress. For, Clause 2 of Section 2 of Article III states that this appellate jurisdiction is ordained "both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

Indeed, Congress' power is even stronger than that. An appellate jursidiction can exist only when there are lower courts from which to appeal. The existence of inferior federal courts, unlike the existence of the Supreme Court, is not mandated by the Constitution. Section 1 of Article III provides that Congress "may" ordain and establish such courts "from time to time." So, we can see that Congress may except and regulate the power of the Supreme Court to hear appeals from inferior courts that Congress has itself established in the first place.

The cases of the Supreme Court, particularly *Ex Parte McCardle,* have, on the whole recognized this power of Congress. I haved done a short analysis of the more important cases, and I ask that it be included in the record at this time.

But this is not the best subject about which to ask the opinions of the justices of the Supreme Court because it requires a recognition of a limitation on their own powers. For, as Alexander Hamilton said in Federalist 80, "no man ought certainly to be a judge in his own case or in any case in respect to which he has the least interest or bias." Additionally, Clause 2 of Section 2 of Article III has not been frequently litigated so the number of case is few. Furthermore, there are frequently dramatic differences between what the Constitution says and what the Supreme Court says the Constitution says.

For these reasons, the "original intention" of the clauses in question seems particularly relevant. I propose to discuss the meaning of the exceptions and regulations clause and, necessarily, of the separation of powers as they are expounded in the Federalist Papers. The original intention does, I think, contradict the conventional wisdom of the legal profession.

The dispersal of political power is one of the bedrock themes of our Constitution. The aggregate of power is divided between two levels of government, state and federal, and the federal share is divided into three parts. A fundamental distinction about these divisions of powers is that the powers of the three branches of the federal government are enumerated while the powers of the states, except for enumerated restrictions, are reserved, or, in other works, the federal government can exercise only specified powers while the states can exercise any powers they want—except for specified restrictions.

With regard to the federal government, the three powers of government, executive, legislative, and judicial, are separated from each other and each is exclusively assigned to a separate department: the executive department, the legislative department, and the judicial department. This separating of the three fundamental powers of government the founding fathers learned from Locke and Montesquieu. To them, and indeed still for us, the reason was obvious. As Madison said in Fedralist 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

Several of the witnesses at the prior day of hearings urged the Congress not to exercise its constitutional powers over the appellate jurisdiction of the Supreme Court because such an exercise would jeopardize the "indpendence" of the Court.

The judiciary is not supposed to be completely independent; neither are the executive or legislative branches. The separation of powers does not mean that.

In the statement of Madison's quoted above, the key work is "all." The "very definition of tyranny" is the "accumulation of all powers, legislative, executive, and judiciary, in the same hands." In the same essay, Federalist 47, Madison answers the objections of those who argue that the separation of powers under the proposed Constitution is not separate enough, the the three branches are not "distinct," that the powers are too "distributed and blended."

Madison answers by quoting and explicating the words of the inventor of the doctrine of the separation of powers, Montesquieu:

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye (i.e. the British Constitution) can amount to no more this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of power of another department, the fundamental principles of a free constitution are subverted." (Emphasis in original)

Madison goes on to show that not one of the state constitutions of his time provided for a separation of powers that was "absolutely separate and distinct" because such an absoluteness would be "impossible and inexpedient" given the nature of "free government."

In the next essay, Federalist 48, Madison explains why the three branches should *not* be "wholly unconnected with each other." Instead, he contends, they should be "connected and blended as to give to each a constitutional control over the others." The reason is that "power is of an encroaching nature." Madison meant *all* power—whether legislative, executive, *or* judicial.

The problem of the encroachment of power was solved, Madison explains in Federalist 51, "by so contriving the interior structure of the government as that its several constitutent parts may, by their mutual relations, be the means of keeping each other in their proper places." So, the three branches are to keep each other properly in their places. No single branch is given the authority to keep the other two in place. Still less is one branch given the authority to decide the encroachment limits of its *own* powers. For, according to Federalist 49, "none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."

With regard to the judicial branch, the Federalists foresaw the least danger because the least amount of power had been given to it. In his famous statement in Federalist 78, Hamilton explains that:

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in its capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

So, the judiciary has the least "capacity" from the very "nature of its functions" to be dangerous.

Nevertheless, the founding fathers and the Federalists were too savvy to fail to realize that *all* power, even "mere judgment", was dangerous.

The judiciary has the same possibilities for the abuse of power that the other two branches have: it can oppress the people and it can be arbitrary.

In Federalist 47, Madison makes the words of Montesquieu his own in pointing out the dangers of the judiciary exercising the executive and legislative powers:

"Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

In Federalist 48, Madison argues that very obvious and definite "landmarks", that is, case precedents, would protect the country from "projects of usurption" by the judiciary.

In Federalist 78, Hamilton warns of an "arbitrary discretion" in the courts. In order to avoid such arbitrariness, Hamilton maintains, that "it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."

The checks on judicial encroachments *possessed by the other branches* are these:

Congress appropriates money for the judicial branch.

The President appoints the judges.

The Senate confirms them.

The House can impeach judges.

The Senate would try the impeached judges.

The Congress creates the inferior Federal courts.

By means of the exceptions and regulations clause, the Congress has nearly complete authority over the appellate jurisdiction of the Supreme Court.

In Federalist 80, Hamilton defends the "particular powers" of the Supreme Court against those who fear its possible "arbitrary discretion." He admits that the Court may force "particular mischiefs" on the country, but the solution would be obvious:

"If some partial inconveniences should appear to be connected with the incorporation of any of them (i.e. the particular judicial powers) into the plan (i.e. the Constitution), it ought to be recollected that the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."

In Federalist 81, Hamilton seems to have the exceptions and regulations clause in mind when he says that although the legislature cannot reverse a decision of the judiciary, "it may prescribe a new rule for future cases." Later, in the same essay, he again emphasizes that the Supreme Court's appellate jurisdiction is subject to "*any* exceptions and regulations which may be thought advisable." Additionally, in discussing the Supreme Court's authority to review the facts of trial courts, Hamilton mentions that "The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no reexamination of facts where they had been tried in the original causes by juries. *This would certainly be an authorized exception.*"

The judicial power is not absolute; it is not completely independent. Neither are the executive or legislative powers. The Constitution provides means whereby the executive and legislative powers may be kept "in their proper places." Just so with the judicial power. The check on the appellate power of the Supreme Court is given to Congress. It is qualified only by the good judgment of Congress.

MATERIAL SUBMITTED FOR THE RECORD

*The Supreme Court on its Own Jurisdiction*

From the beginning of the Republic, the Congress has exercised its authority over the jurisdiction of the Supreme Court and the lower federal courts. Probably the most important statute passed by the First Congress was the landmark Judiciary Act of 1789 which actually created the federal judicial system, left largely inchoate by the Constitution. As anticipated by Article III, which left the establishment of any lower federal courts to Congress, the Act provided for a system of district courts and circuit courts (considering of two Supreme Court justices and one district court judge). Both of these kinds of courts were given limited and carefully circumscribed jurisdictions, and the Supreme Court's appellate jurisdiction was created and also equally limited. Acting under the "exceptions and regulations" clause, the Congress provided that the Supreme Court could accept appeals in civil cases from the circuit courts only if more than $2,000 was involved and also decreed that the highest court could not hear appeals in criminal cases—which Congress did not change until 1889. Additionally, the Congress decided to qualify even the constitutionally-mandated original jurisdiction of the Supreme Court by providing that, in certain cases, the Court would share its original jurisdiction with the newly-established lower federal courts. The overall intention of the Judiciary Act of 1789 was that most cases and controversies would be decided in the state courts.

Early decisions of the Supreme Court show a complete understanding of the constitutionally-granted authority of Congress over the appellate jurisdiction of the federal judiciary. In the 1796 case of *Wiscart* v. *D'Auchy*, Chief Justice Oliver Ellsworth, who had been a member of the Committee on Detail at the Constitutional Convention and later one of the authors of the Judiciary Act of 1789, wrote:

"The constitution, distributing the judicial power of the U.S., vests in the Supreme Court, an original as well as appellate jurisdiction. . . . Here, then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is simply, whether Congress has established any rules for regulating its exercise." (3 Dall. 321 at 326)

In the 1799 decision of *Turner* v. *Bank of North America*, Ellsworth said that a "circuit court . . . is of limited jurisdiction and has cognizance, not of cases generally, but only of a few specifically circumscribed . . ." (4 Dall. 8 at 10). In a footnote to the same decision, Justice Ellsworth added:

"The notion has frequently been entertained that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound . . . to enlarge the jurisdiction of the federal courts, to every subject, to every form, which the constitution might warrant." (at 11)

In the 1810 case of *Durousseau* v. *U.S.*, Chief Justice Marshall emphasized the same point:

"The appellate powers of this Court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such acts as have been passed on the subject. When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court." (6 Cranch 307 at 313)

In 1845, in the case of *Cary* v. *Curtis*, the Supreme Court declared that the "judicial power of the United States [is] dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress . . ." (3 How. 236 at 245). In the 1868 case of *Nashville* v. *Cooper*, the Court emphasized the point again by saying that "two things are necessary to create jurisdiction. . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it" (6 Wall. 247 at 252).

By way of comparison, the Court has ruled, in what was probably its most famous case, *Marbury* v. *Madison*, that its original jurisdiction has been given directly from the Constitution and is not dependent on any acts of Congress. In *Marbury* the Court ruled that a clause of the Judiciary Act of 1789 was unconstitutional because it acted to *expand* the original jurisdiction of the Supreme Court—something that could be accomplished only by constitutional amendment.

In the 1820s and 1830s, there was a major constitutional confrontation between the Supreme Court and the highest courts of the states. Under Section 25 of the

Judiciary Act of 1789, Congress had authorized the Supreme Court to review decisions of the states' courts under the federal constitution. States began to appeal to Congress to remove this jurisdiction from the Supreme Court. A bill was introduced in the House to that effect but even though a significant percentage of the House supported it, the bill never made it to a floor vote, and eventually the confrontation passed.

In 1867, Congress, for the first and only time in the nation's history, acted to prevent a decision of the Supreme Court by repealing its jurisdiction over the subject matter of the case. William McCardle, a Mississippi editor who was violently opposed to the post-Civil War Reconstruction Acts, was arrested and held for military trial by Major General Edward Ord, the commander of the Northern Occupation forces in Mississippi and Arkansas. McCardle, having been denied a writ of *habeas corpus* in the federal circuit court, appealed to the Supreme Court which had only six months before been granted jurisdiction by Congress to review denials of writs of *habeas corpus*.

The Supreme Court accepted the petition and the Congress, dominated by the radical Republicans of the Reconstruction era who were unsympathetic to challenges to the military rule of the South, moved immediately to repeal the jurisdictional statute that it had only recently passed.

The Court had no choice but to dismiss the case for lack of jurisdiction. Writing for the Court, Chief Justice Salmon P. Chase said:

"We are not at liberty to inquire into the motive of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this Court is given by express words. What, then is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. . . ." (*Ex parte McCardle* 7 Wall. 506 at 514-515)

Nevertheless, four years later in *U.S.* v. *Klein*, the Court declared unconsitutional another statute that Congress had passed under its power to make exceptions and regulations to the appellate jurisdiction of the Court. President Lincoln had offered full presidential pardons to all Confederates who swore allegience to the Constitution and the Union. Persons pardoned were then able to recover any of their property confiscated by the Union during the war. Klein, a pardonee, sued in the federal Court of Claims because his property had not only been confiscated, but sold to another. The Court of Claims ruled in his favor, but the case was appealed to the Supreme Court. Before the Court could act, the Reconstruction Congress passed a statute removing the Court's jurisdiction over appeals from the Court of Claims based on presidential pardons without some additional proof of loyalty.

In a 7-2 decision, with Chief Justice Chase again writing the opinion, the Court ruled that Congress, in this instance, had acted unconstitutionally under the exceptions and regulations clause. Nevertheless, the Court emphasized that Congress does have the power to remove jurisdiction "in a particular class of cases":

"Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient. . . . But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court has adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We have already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . . To the Executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons that no doubt might exist as to their character, restoration of property was expressly pledged; and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath. . . . Now, it is clear that the Legislature cannot change the effect of such a pardon any more than the Executive can change a law." (13 Wall. 128 at 142, 145, 146, 147, 148)

It can be seen that the *Klein* Court based its decision not only on the exceptions and regulations clause of Article III, but also on the pardoning power granted exclusively to the President by Article II, Section 2, Clause 1. Also, and in contrast to *McCardle*, the *Klein* Court found that it was unconstitutional for Congress to prescribe the decision in a case by eliminating some of the *evidence*, that is, a pardon—matters of evidence in a particular pending case being pre-eminently a judicial concern. In *McCardle*, the Congress had restricted the Court's authority over a judicial *procedure*, that is, a writ of *habeas corpus*, and, further, a certain statutory *class* (i.e., under the Reconstruction Acts only) of the writs—the Court's jurisdiction over other *habeas corpus* writs being left untouched. Since the *Klein* case of 1872, there have been no significant controversies in the Supreme Court about the exceptions and regulations clause. And no judge, save for Justice Douglas, has ever seriously questioned the authority of the Congress over the Supreme Court's appellate jurisdiction. In a footnote to his opinion in the 1962 case of *Glidden* v. *Zdanok* (370 U.S. 530), Douglas wondered (at 605) "whether the *McCardle* case could command a majority view today." But, six years later in *Fleet* v. *Cohen* (392 U.S. 83), Douglas, in a concurring opinion, cited *McCardle* when he said "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Article III" (at 109).

In 1932, Congress culminated more than two decades of disputes between legislatures and the federal courts over labor issues by passing the Norris-LaGuardia Act, removing the authority of the lower federal courts to issue injunctions in such cases. In the 1938 case of *Lauf* v. *E. G. Skinner & Co.*, the Supreme Court upheld the constitutionality of the Norris-LaGuardia Act. Associate Justice Roberts, writing for the Court, said that there "can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." (303 U.S. 323 at 330)

Over the past 30 years, as the Supreme Court has accrued more powers to itself, Congress has periodically considered legislation to repeal specific areas of jurisdiction of the highest court. At the beginning of this modern era, the American Bar Association joined by Justice Roberts sought to head off the whole controversy by recommending the adoption of a constitutional amendment giving the Court, instead of Congress, authority to determine its appellate jurisdiction. But the idea received little congressional support. Throughout the post-World War II era and up to the present time, Congress has considered legislation to limit the jurisdiction of the Supreme Court and the lower federal courts in a wide variety of areas: desegregation, certain criminal procedures, internal security, school prayer, apportionment, and abortion. In 1964, the House passed a bill eliminating the jurisdiction of the Supreme Court to hear cases dealing with the apportionment of any state legislature, but the bill failed in the Senate.

## STATEMENT OF DR. HERMINE HERTA MEYER, ATTORNEY AT LAW, CHEVY CHASE, MD.

Dr. **Meyer**. Mr. Chairman, first I want to say that for quite some time many citizens of this Nation have felt that they are governed, not by the Constitution of the United States, nor by the laws enacted by the persons whom the people have elected for that purpose, but by decrees of unelected Federal judges that are forced on the people as the law of the land.

These citizens will be very grateful to this subcommittee and particularly to you, Mr. Chairman, for giving serious consideration to the question of how to make use of some of the powers which are available to Congress under the Constitution for the purpose of placing restraints on the judiciary.

Several bills have been introduced in Congress which propose to make use of the power of Congress over the jurisdiction of the Federal courts in order to prevent them from taking jurisdiction in State cases relating to school prayers, school attendance because of race, and abortion.

Opponents to these bills have attacked them as unconstitutional on many grounds. They see in them proposals of stripping the Federal courts of their jurisdiction over important constitutional problems.

According to these opponents, the bills are an attempt to amend the Constitution through the back door. In their opinion, a decision of the Supreme Court interpreting a constitutional provision can be overturned only by a constitutional amendment in accordance with article 5 of the Constitution—that is, with consent of two-thirds of Congress and three-fourths of the States.

In short, they attribute to such a Supreme Court decision the force and effect of the Constitution itself which implies that the Supreme Court, with the consent of only five Supreme Court judges, can amend the Constitution.

In a comprehensive study entitled, "The Power of Congress Over the Jurisdiction of the Federal Courts and the Effects of the Supremacy Clause," which I prepared upon request, I have shown that every one of these objections can be refuted from the Constitution itself and from its sources. I shall be glad to make a copy of this study available to the subcommittee for whatever use you might wish to make of it.

Senator HATCH. We would like to have that.

## THE POWER OF CONGRESS OVER THE JURISDICTION OF THE FEDERAL COURTS

Dr. MEYER. Because of lack of time, I have to limit myself here to a few essential points. Therefore, I shall first show briefly that the Constitution has indeed given Congress plenary power over the jurisdiction of the lower Federal courts and over the appellate jurisdiction of the Supreme Court.

There is absolutely no controversy that Congress has full power over the jurisdiction of the lower Federal courts because of the provision in the Constitution which has given Congress the power to establish and abolish lower Federal courts.

Article III, section 2, clause 2 enumerates the few cases in which the Supreme Court shall have original jurisdiction and then provides:

> In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Some commentators have called this the exceptions clause and have argued that the word "exceptions" implies that Congress has less than full power over the Court's appellate jurisdiction and that the exceptions clause does not include cases that have a constitutional dimension..

Fortunately, we have very authoritative sources that leave no doubt as to the meaning of the exceptions and regulations clause.

One such authority is Alexander Hamilton, one of the members of the Federal Convention of 1787 where the Constitution was drafted. In No. 80 of the Federalist Papers, he gave a review of the Federal judicial powers in order to impress the reasonableness of the system upon those who had expressed fear of its reach. He assured them that if any "partial inconveniences" should appear, "the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."

Any remaining doubt about the meaning of that clause has been removed by a man whose authority cannot be questioned—namely, Oliver Ellsworth. He was a member of the Federal Convention of 1787 and of the Committee of Detail where the clause providing for the Supreme Court's appellate jurisdiction was formulated.

He also served in the U.S. Senate from 1789 to 1796 and was the chief author of the first act of Congress regulating the jurisdiction of the Federal courts—namely, the Judiciary Act of 1789. In 1796, he became Chief Justice of the United States.

In the first case in which the appellate power of the Supreme Court was in issue—that was in *Wiscart* v. *Dauchy*—he said:

> The constitution, distributing the judicial power of the United States, vests in the Supreme Court original as well as appellate jurisdiction . . . Here then is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?

Congress has made regular use of its power to control the jurisdiction of the Federal courts, not only by affirmative regulations but also by taking away jurisdiction which the Federal courts had previously exercised. Most of them have already been mentioned to you, so I will just skip that.

Probably because of such authoritative sources of the meaning of the Supreme Court's appellate jurisdiction clause, the Supreme Court has never questioned the plenary power of Congress over its appellate jurisdiction, not even Justice Warren who said in *Carroll* v. *United States* that the existence of appellate jurisdiction in a specific Federal court "is dependent upon authority expressly conferred by statute."

Most recently, the Supreme Court itself has asked Congress to take away its mandatory appellate jurisdiction and permit it to retain only discretionary jurisdiction on writs of certiorari.

The Senate responded with a bill, S. 450, which passed the Senate of the 96th Congress but not the House. Had it passed, no litigant, not even a State, would have had a right to obtain a decision of the highest court on an important constitutional issue.

The Supreme Court had urged the Congress to pass legislation eliminating all mandatory appellate jurisdiction in a letter of June 22, 1978. It was signed by all nine members of the Supreme Court. The letter does not indicate with one word that the power of Congress over the Court's appellate jurisdiction was in any way restricted.

If the Supreme Court did not believe that Congress has full power over the Court's appellate jurisdiction because there was some constitutional right to appeal, it could never have asked Congress to relieve it of all cases providing for a right to appeal.

There is no doubt that the Constitution has given Congress unrestricted power over the jurisdiction of the lower Federal courts and over the appellate jurisdiction of the Supreme Court.

## NO CONSTITUTIONAL ISSUES ARE INVOLVED

It has been argued that legislation prohibiting the Federal courts from taking jurisdiction in State cases relating to abortion, school attendance because of race, and school prayers would be undesirable because it would prevent the Supreme Court from dealing with important constitutional issues and subject the Nation to the possibility of 50 different views of certain vital provisions of the Constitution by 50 different State courts.

It ought to be remembered that all these matters have been under the exclusive protection of the States and their courts from the beginning of the Constitution until very recently—for instance, school prayers until 1962 and abortion even until 1973.

The State laws differed from each other, but why has there never been any complaint that there were different interpretations of the Federal Constitution by the different State courts? The answer is obvious: No constitutional issues were involved in any of these cases.

Matters of abortion, school prayers, and composition of the classrooms in State schools belong to the retained rights of the States over which the Constitution has given the Federal courts no jurisdiction in suits by an individual against a State or its instrumentalities.

With the Constitution of the United States, the States created a Federal Government with limited powers, all of which had been delegated by the States. These powers are enumerated in the Constitution.

The States retained a residual sovereignty over the powers not delegated to the United States by the Constitution nor prohibited by it to the States. Upon special request of the States, this fact was made part of the Constitution as the 10th amendment.

A power retained by the States can be taken from them only by a constitutional amendment pursuant to article V—that is, with the consent of two-thirds of Congress and three-fourths of the States.

Any Federal jurisdiction over powers reserved to the States must, of course, appear in the Constitution.

In *Cohens* v. *Virginia*, Chief Justice Marshall has given an analysis of article III, where the judicial power of the United States is described, which I found very helpful for the understanding of that article.

He explained that Federal jurisdiction is given in two classes of cases. In the first class, their jurisdiction depends on the character of the cause, whoever may be the parties. This comprehends all cases arising under this Constitution—meaning the Constitution as written and intended by the framers and as legally amended—the laws of the United States—meaning acts of Congress—and treaties made under the authority of the United States.

In the second class, Federal jurisdiction depends entirely on the parties. They are enumerated in article III, section 2, clause 1, as modified by the 11th amendment.

It should be noted that article III, section 2, clause 1 has given the Federal courts no jurisdiction over controversies between a State and its own citizens and that the 11th amendment precludes Federal jurisdiction in suits against a State by a citizen of another State or of a foreign state.

Article III, section 2, clause 2 of the Constitution describes in what situation the Supreme Court has original jurisdiction and when it has appellate jurisdiction. Clause 2, of course, refers to those cases in which the grant of power is made in clause 1.

As Chief Justice Marshall made clear,

> the original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party . . . In such cases

For instance, in State criminal cases or in a case between a State and its citizens—

> therefore, the Supreme Court cannot take original jurisdiction.

In all other cases to which the grant of power made in clause 1 extends, the Supreme Court can take only appellate jurisdiction.

Since no Federal judicial power is given in suits by one or more individuals against a State, the Supreme Court can take appellate jurisdiction only in a case in which Federal judicial power is given because of the character of the cause regardless as to who the parties are.

The character of the cause, to which Federal judicial power extends, comprehends all cases arising under this Constitution, acts of Congress, and treaties made under the jurisdiction of the United States.

Matters concerning abortion and schools are nowhere mentioned in the Constitution, and religion is mentioned in the first amendment not as a grant of power but as a special restriction on the Federal Government. They belong, therefore, to the retained powers of the States, and no constitutional issue is involved. The Constitution has given the Federal courts no jurisdiction over such cases.

In order to justify Federal jurisdiction in such cases, the Supreme Court fabricated a constitutional issue. In my study, "The Power of Congress Over the Jurisdiction of the Federal Courts and the Effect of the Supremacy Clause," and also in my book, "The History and Meaning of the Fourteenth Amendment," I have shown how the Supreme Court did this in matters of abortion and school prayers by the misuse of the due process clause of the 14th amendment and in matters of apportionment of State legislatures and school attendance because of race by the misuse of the equal protection clause of the 14th amendment.

I shall be glad to make also a copy of my 14th amendment book available to this subcommittee.

Senator HATCH. Thank you. We are very happy to have that.

Dr. MEYER. I have also described briefly the Supreme Court's fabrication of a constitutional issue in the school prayer cases in a pamphlet, "Do School Prayers Violate the Constitution?" a copy of which is attached to this statement. I shall confine myself, therefore, to describe briefly how the Supreme Court created a constitutional issue in matters of abortion.

As said before, abortion is nowhere mentioned in the U.S. Constitution. According to the 10th amendment to the Constitution, the power to legislate respecting abortion belongs to the powers reserved to the States to which the judicial power of the United States does not extend. Considering such constitutional clarity, it takes inventiveness to take this power from the States without a constitutional amendment.

In 1973, the Supreme Court managed this in its decision in *Roe* v. *Wade* in the guise of constitutional interpretation. For this purpose, the Court first invented a constitutional right of privacy which also is nowhere mentioned in the Constitution.

Justice Blackmun who delivered the opinion of the Court cited a whole page full of Supreme Court decisions in which the Court had found a right of privacy in the 1st, 4th, 5th, 9th, and 14th Amendments. This right of privacy, he said, was founded in the 14th amendment's concept of personal liberty and restriction upon State action.

The connection with the 14th amendment was found by the Court in the word "liberty" which appears in the due process clause. This tenuous connection was supposed to protect a person from the criminal abortion laws of the State but only during the first 3 months of pregnancy.

During the second trimester of pregnancy, the Court found that the State may have an interest in protecting the health of the mother. Therefore, the Court "permitted" the State to regulate the abortion procedure in ways that are reasonably related to maternal health.

During the third trimester, according to the Court's great wisdom, human life has begun. Therefore, the Court "permitted" the States to assert a compelling State interest to protect the life of the unborn child and even proscribe abortion except where it is necessary for the preservation of the life of the mother.

The Supreme Court's decision was that: "A state criminal abortion statute * * * without regard to pregnancy and without recognition of the other interests involved, is violative of the due process clause of the 14th amendment."

The due process clause in the 14th amendment reads: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law."

In my book, "The History and Meaning of the Fourteenth Amendment," I have traced the due process clause from its origin in the Magna Carta of 1215 to the statute of Edward III of 1354 where the expression, "due proces de lei," translated with "due process of law," first appeared, to the laws of the American colonies, to the fifth amendment, and finally to the 14th amendment.

When it was included in the 14th amendment, it was already over 600 years old. Its meaning had always remained the same; namely, that no person could be sentenced to death, or to imprisonment, or to forfeiture of property without first having been given an opportunity to answer to the charges and have a proof procedure—today called trial—in accordance with applicable laws. In short, it guarantees to every person charged with crime a trial pursuant to law. Originally, the Supreme Court interpreted the due process clause exactly in this way.

Obviously, the due process clause has nothing to do with abortion. To say that any State abortion law can violate the due process clause or any other provision of the 14th amendment makes no sense. To make nonsense of a constitutional provision is not constitutional interpretation. Evidently, what the Supreme Court did was to amend the Constitution through the back door.

The Constitution has given the Supreme Court no power to amend the Constitution, and there has never been a constitutional amendment pursuant to article V of the Constitution to take from the States their retained power to legislate with respect to abortion.

From the foregoing discussion it ought to be clear that congressional legislation forbidding the lower Federal courts from taking jurisdiction and the Supreme Court from taking appellate jurisdiction in State cases relating to school prayers, school attendance because of race, and abortion would not take away any jurisdiction from the Federal courts which the Constitution has given them. It would merely prevent them from taking jurisdiction in cases over which the Constitution has given them no jurisdiction.

Such legislation would therefore only reestablish constitutional conditions which the Supreme Court has disturbed.

Mr. Chairman, after I had already delivered this paper to the office of the subcommittee, I learned that the argument has been made, and was discussed here too, that if Congress passed such legislation Federal law would be frozen at this point of existing Supreme Court decisions and the supremacy clause of the Constitution would bind the State courts to follow such decisions.

In order to answer that, I have therefore thought it was necessary to write a supplement to my statement which I ask your permission to include in the official record.

Senator **Hatch**. We will include your supplement in the record.

Dr. **Meyer**. In this supplement, I am describing the status of the Supreme Court decision under the Constitution because this argument means that if Congress would pass this legislation it would be futile because the State courts would have to follow the existing Supreme Court decisions, and this could not be changed by the Supreme Court itself.

This has never been intended by the framers of the Constitution, and this is certainly not the meaning of the supremacy clause of the Constitution.

Senator **Hatch**. I am going to have my aide come and get those materials right now.

Dr. Meyer, we hear a great deal of talk about the need for an independent judiciary. No one talks about the need for an independent Congress.

Does the Constitution intend to make the Judiciary independent, and, if so, in what sense?

Dr. **Meyer**. Courts are independent only insofar as they are not subject to any directives as to how to decide their cases. But they are bound by the Constitution. Under the Constitution, Federal courts have only been given the power to decide individual cases, and their decisions were intended to be binding upon the parties to a suit as to the object of that suit. They were not intended to establish generally binding law, not even the Supreme Court when interpreting a constitutional provision. The idea that the Supreme Court is the ultimate arbiter of all constitutional questions with binding effect on every one else was not created by the Constitution and was not yet accepted at Lincoln's time, as is shown by the

Lincoln-Douglas debate and Lincoln's first inaugural address, which I cited briefly in the supplement and more extensively in my study. The Constitution has given only Congress the power to make generally binding Federal laws. Through this power and its power over the jurisdiction of the Federal courts, the power of Congress is actually superior to that of the judiciary.

Madison said in No. 51 of the Federalist Papers that in a "republic"—what he described was actually an indirect democracy—a representative democracy—in such a government, the legislative authority necessarily predominates. The reason is, of course, that the Constitution has been based on the principle of self-government of the people, and the Members of Congress are the elected representatives of the people.

Senator HATCH. Your book, as I recall, was on the supremacy clause and the exceptions clause.

Dr. MEYER. This particular study, yes, but it has not yet been published.

Senator HATCH. Right.

The Supreme Court, in *Martin* v. *Hunters, Lessee*, discussed the need for uniformity of decisions throughout the United States. How, in your opinion, can the exceptions clause be reconciled with this language of the Court?

Dr. MEYER. With which amendment?

Senator HATCH. How can the exceptions power be reconciled with Supreme Court language about uniformity of decisions throughout the United States?

Dr. MEYER. The Constitution makes no such demand. It certainly is not contained in the supremacy clause. In my study, I explained its meaning and the reason for its enact.

There were two reasons for the supremacy clause. One was that it was put in the Constitution as a concession of the States—that they would accept as supreme law of the land the Constitution of the United States and the acts of Congress and, of course, the treaties of the United States.

A reason for that clause was that the suggestion had been made—that all State laws had to be subject to the authority of the Federal Government and of the so-called Council of Revision consisting of the Chief Executive and of judges, and to that the majority of the delegates at the Federal Convention objected.

They offered as a supplement of this Federal control over State laws, which they rejected, that they would recognize as superior to inconsistent State laws the Federal Constitution and the acts of Congress and the treaties of the United States, and that the State judges would be bound thereby.

Another reason was that the delegates had voted down a motion that lower Federal courts should be part of the Constitution. They wanted that the original Federal jurisdiction, with very few exceptions, should be in the State courts, and that is, in fact, the system that prevails in all other countries with a Federal system.

Madison persuaded them to give Congress the power to establish Federal courts and also, of course, abolish Federal courts.

That was how the supremacy clause came in. It was not a clause to give the Supreme Court or any Federal court the authority to dictate to the States what they should have to recognize as supreme law of the land.

Senator **Hatch**. Let me ask you, as well, about the busing remedy removal. Is removal of a remedy any more or less justifiable under the exceptions clause than removal of power to review State statutes?

Dr. **Meyer**. Is the power what?

Senator **Hatch**. Is removal of a remedy any more or less justifiable under the exceptions clause than removal of power to review State statutes?

Dr. **Meyer**. I do not understand.

Senator **Hatch**. Let me rephrase the question. Give us your opinion with regard to the busing remedy.

Dr. **Meyer**. Of course it is justified. Actually, Congress has full power to prevent the Federal courts from taking jurisdiction in any matter relating to schools. They are not part of the Constitution. They belong to the retained rights of the States, and all these decisions of the Federal courts concerning busing are actually made without jurisdiction given to them by the Constitution.

You should also realize that before 1954, before the *Brown* decision, nobody doubted that the power over schools was completely in the States.

I think I have already said in my supplement that it was never the intention of the Framers of the Constitution to give a Supreme Court decision the character and the power of the law of the land or even of supreme law of the land. That is, of course, what is claimed when it is said that the supremacy clause forces the States to give this effect to a Supreme Court decision interpreting the Constitution. That makes a Supreme Court decision actually equal to a constitutional provision, and that was never the intention of the Framers of the Constitution.

On the contrary, as I show in the supplement and, of course, in much more detail in my study, the idea was that the Supreme Court should have only authority to adjudicate constitutional questions and that they should bind only the parties to the individual action—in other words, that a judgment of the Supreme Court should never go beyond what a judgment of a court had been since antiquity.

This explanation appears in the records of the Federal Convention. The only sentence in the Constitution which gives Federal courts the authority to expound it is the sentence in article III, section 1, clause 1: "The judicial power shall extend to all cases in law and equity arising under this Constitution."

At the Federal Convention of 1787, Madison first objected to the insertion of this sentence into the Constitution. The draft which came out of the Committee of Detail had provided that the jurisdiction of the Federal courts should extend to all cases arising under the laws passed by the Legislature of the United States.

Later, Dr. Johnson of Connecticut moved that the jurisdiction be extended to all cases arising under this Constitution.

Madison expressed doubt whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, but then he agreed, after it was generally understood, that the jurisdiction given was limited to cases of a judiciary nature.

Madison emphasized that the right of expounding the Constitution in cases not of this nature ought not to be given to the Judiciary Department.

All this is in the records of the Federal Convention which I have cited here.

This was understood to mean that the Federal courts, including the Supreme Court, would have jurisdiction to interpret constitutional questions in a case brought before them but that such interpretations would bind only the parties properly before the Court.

Thus a Supreme Court decision is not the law of the land or supreme law of the land which the States just have to follow. It is no part of the supremacy clause.

Senator **HATCH**. Thank you, Dr. Meyer. You have been very literate and articulate here today, and we are grateful to have your manuscript plus the copy of your book. I will personally read that. I am very appreciative that you have put forth these efforts.

Without objection, your prepared text and supplement will be included in the record at this point.

[The prepared and supplemental statements of Dr. Meyer and additional material follow:]

## PREPARED STATEMENT OF HERMINE HERTA MEYER

Mr. Chairman and Members of the Subcommittee:

For quite some time, many citizens of this Nation have felt that they are governed, not by the Constitution of the United States, nor by the laws enacted by persons whom the people elected for that purpose, but by decrees of unelected federal judges that are forced on the people as "the law of the land." These citizens will be grateful to this Subcommittee for giving serious consideration to the question how to make use of some of the powers which are available to Congress under the Constitution. for the purpose of placing restraints on the federal judiciary.

Several bills have been introduced in Congress which propose to make use of the power of Congress over the jurisdiction of the federal courts in order to prevent them from taking jurisdiction in state cases relating to school prayers, school attendance because of race, and abortion. (S.481, H.R. 865, H.R.867, H.R.869).

Opponents to these bills have attacked them as unconstitutional on the ground, among other things, that they violate the separation of power principle and the supremacy clause. They see in them proposals for "stripping" the federal courts of their jurisdiction over important constitutional problems. They also worry that, if such legislation passes, the Nation might have 50 differing views of certain vital provisions of the Constitution by 50 different state courts. According to the opponents, the bills are an attempt to amend the Constitution through the back door. In their opinion, a decision of the Supreme Court interpreting a constitutional provision can be overturned only by a constitutional amendment in accordance with Article V of the Constitution, that is with consent of two thirds of Congress and three fourths of the States. In short, they attribute to such a Supreme Court decision the force and effect of the Constitution itself which implies that the Supreme Court, with the consent of only five Supreme Court judges, can amend the Constitution.

In a comprehensive study, entitled "THE POWER OF CONGRESS OVER THE JURISDICTION OF THE FEDERAL COURTS AND THE EFFECT OF THE SUPREMACY CLAUSE", which I prepared upon request, I have shown that every one of these objections can be refuted from the Constitution itself and from its sources. I shall be glad to make a copy of this study available to this Subcommittee. Because of lack of time, I have to limit myself here to a few essential points. Therefore I shall first show briefly that the Constitution has indeed given Congress plenary power over the jurisdiction of the lower federal courts and over the appellate jurisdiction of the Supreme Court.

## THE POWER OF CONGRESS OVER THE JURISDICTION OF THE FEDERAL COURTS.

Article III, Section 1 of the Constitution vests the judicial power of the United States "in one supreme Court, and in such inferior federal courts as the Congress may from time to time ordain and establish."

There is no controversy that the power to establish and abolish inferior federal courts has given Congress complete authority over their jurisdicdiction. This has been invariably recognized by the Supreme Court. Sheldon et al. v. Sill, 49 U.S. (8 How.) 441, 449 (1850); Kline v. Burke Construction Co., 260 U.S.226, 233-234 (1922); Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

Article III, Section 2, Clause 2 enumerates the few cases in which the Supreme Court shall have original jurisdiction, and then provides:

> "In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Some commentators have called this "the exceptions clause," and have argued that the word "exceptions" implies that Congress has less than plenary control over the Supreme Court's appellate jurisdiction, and that the "exceptions" clause does not include cases that have a constitutional dimension.

Fortunately, we have very authoritative sources that leave no doubt as to the meaning of the "exceptions" and "regulations" clause.

One such authority is Alexander Hamilton, one of the members of the Federal Convention of 1787, where the Constitution was drafted. In No.80 of the Federalist Papers, he gave a review of the federal judicial powers in order to impress the reasonableness of the system upon those who had expressed fear of its reach. He assured them that if any "partial inconveniences" should appear, "the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."

Any remaining doubt about the meaning of that clause has been removed by a man whose authority cannot be questioned, namely Oliver Ellsworth. He was a member of the Federal Convention of 1787 and of the Committee of Detail where the clause providing for the Supreme Court's appellate jurisdiction was formulated. See Max Farrand, The Records of the Federal Convention of 1787, pp.97, 106. He also served in the United States Senate from 1789-1796 and was the chief author of the first act of Congress regulating the jurisdiction of the federal courts, namely the Judiciary Act of 1789. In

1796 he became Chief Justice of the United States. He said in Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796):

> "The constitution, distributing the judicial power of the United States, vests in the Supreme Court original as well as appellate jurisdiction. ... Here then is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?"

Congress has made regular use of its power to control the jurisdiction of the federal courts, not only by affirmative regulations, but also by taking away jurisdiction which the federal courts had previously exercised. One such example is the McCardle case where Congress divested the Supreme Court of its appellate jurisdiction after it had already taken jurisdiction. 74 U.S.(7 Wall.) 506, 513-514 (1879). Another example is the Norris-LaGuardia Act of March 23, 1932, 29 U.S.C. 101 et seq., which, with certain exceptions, took from the federal courts their power to issue injunctions in a case involving labor disputes. This too was recognized by the Supreme Court as a valid exercise of congressional power over the jurisdiction of the federal courts. Milk Wagon Drivers Union v. Lake Valley Farm Products. 311 U.S.91, 103 (1940).

Probably because of such authoritative sources of the meaning of the Supreme Court's appellate jurisdiction clause, the Supreme Court has never questioned the plenary power of Congress over its appellate jurisdiction, not even Chief Justice Warren who said in Carroll v. United States, 354 U.S. 394, 399 (1957), that the existence of appellate jurisdiction in a specific federal court "is dependent upon authority expressly conferred by statute."

Most recently, the Supreme Court itself has asked Congress to take away its mandatory appellate jurisdiction and permit it to retain only discretionary jurisdiction on writs of certiorari. The Senate responded with a bill, S.450-96th Cong., which passed the Senate of the 96th Congress, but not the House. Had it passed, no litigant, not even a State, would have had a right to obtain a decision of the highest court on an important constitutional issue.

The Supreme Court had urged the Congress to pass legislation eliminating all mandatory appellate jurisdiction in a letter of June 22, 1978, which is printed as Appendix I to Senate Report No.96-35. It was signed by all nine members of the Supreme Court. The letter does not indicate with one word that the power of Congress over the Court's appellate jurisdiction was in any way restricted. If the Supreme Court did not believe that Congress has full power over the Court's appellate jurisdiction because there was some constitutional right to appeal. it could never have asked Congress to relieve it of all cases providing for a right to appeal.

There is no doubt that the Constitution has given Congress unrestricted power over the jurisdiction of the lower federal courts and over the appellate jurisdiction of the Supreme Court.

### NO CONSTITUTIONAL ISSUES ARE INVOLVED .

It has been argued that legislation prohibiting the federal courts from taking jurisdiction in state cases relating to abortion, school attendance because of race and school prayers would be undesirable because it would prevent the Supreme Court from dealing with important constitutional issues and subject the Nation to the possibility of 50 different views of certain vital provisions of the Constitution by 50 different state courts.

It ought to be remembered that all these matters have been under the exclusive protection of the States and their courts from the beginning of the Constitution until very recently: for instance, school prayers until 1962 and abortion even until 1973. The State laws differed from each other. But why has there never been any complaint that there were different interpretations of the Federal Constitution by the different State courts? The answer is obvious: no constitutional issues were involved in any of these cases. Matters of abortion, school prayers and composition of the class rooms in state schools belong to the retained rights of the states over which the Constitution has given the federal courts no jurisdiction in suits by an individual against a State or its instrumentalities.

As is well known, the Constitution was drafted in the Federal Convention of 1787 by the delegates of 12 of the original States. (Rhode Island had sent no delegates), and later ratified by each of the 13 States by their highest authority, namely by state conventions especially elected for that purpose by the people of each State. At that time, the States possessed all powers of sovereignty with the exception of the few powers which the States had delegated to the United States in Congress by the Articles of Confederation of 1781. With the Constitution of the United States, the States created a federal government with limited powers, all of which had been delegated by the States. These powers are enumerated in the Constitution. The States retained a residual sovereignty over the powers not delegated to the United States by the Constitution, nor prohibited by it to the States. Upon special request of the States, this fact was made part of the Constitution as the Tenth Amendment. A power retained by the States can be taken from them legally only by a constitutional amendment pursuant to Article V, that is with the consent of two thirds of Congress and three fourths of the States.

## THE CONSTITUTION HAS GIVEN THE FEDERAL COURTS NO JURISDICTION OVER SUITS BY INDIVIDUALS AGAINST A STATE ARISING UNDER THE POWERS RESERVED TO THE STATES.

Any federal jurisdiction over powers reserved to the States must, of course, appear in the Constitution.

The judicial power of the United States is described in Article III, Section 2, Clause 1 of the Constitution. It reads:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State;*-- between Citizens of different States, -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

*This clause has been modified by the Eleventh Amendment which reads:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In Cohens v. Virginia, 19 U.S.(6 Wheat.) 264, 378, 398, 399 (1821), Chief Justice Marshall has given an analysis of that article which I found very helpful for its understanding. He explained, that federal jurisdiction is given in two classes of cases:

In the first class, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends all cases arising under this Constitution (meaning the Constitution as written and intended by the framers and as legally amended), the laws of the United States (meaning acts of Congress), and treaties made under the authority of the United States.

In the second class, federal jurisdiction depends entirely on the parties. They are enumerated in Article III, Section 2, clause 1, as modified by the Eleventh Amendment.

It should be noted that Article III, Section 2, Clause 1, has given the federal courts no jurisdiction over controversies between a State and its own citizens, and that the Eleventh Amendment precludes federal jurisdiction in suits against a State by a citizen of another State or of a foreign State.

Article III, Section 2, Clause 2 of the Constitution declares:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Clause 2, of course, refers to those cases, in which the grant of power is made in clause 1.

As Chief Justice Marshall made clear, "the original jurisdiction of the Supreme Court,in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party. ... In such cases, therefore, the Supreme Court cannot take original jurisdiction." 19 U.S., at 398, 399.

In all other cases to which the grant of power made in clause 1 extends, the Supreme Court can take only appellate jurisdiction. Since no federal judicial power is given in suits by one or more individuals against a State, the Supreme Court can take appellate jurisdiction only in a case in which federal judicial power is given because of the character of the cause regardless as to who the parties are. The character of the cause, to which federal judicial power extends comprehends all cases arising under this Constitution, acts of Congress and treaties made under the jurisdiction of the United States.

Matters concerning abortion and schools are nowhere mentioned in the Constitution, and religion is mentioned in the First Amendment not as a grant of power, but as a special restriction on the Federal Government. They belong, therefore, to the retained powers of the States and no constitutional issue is involved. The Constitution has given the federal courts no jurisdiction over such cases.

In order to justify federal jurisdiction in such cases, the Supreme Court fabricated a constitutional issue. In my study on "The Power of Congress over the Jurisdiction of the Federal Courts and the Effect of the Supremacy Clause," and also in my book, "The History and Meaning of the Fourteenth Amendment"(New York 1977) I have shown how the Supreme Court did this in matters of abortion and school prayers by the misuse of the due process clause of the Fourteenth Amendment, and in matters of apportionment of state legislatures and school attendance because of race by the misuse of the equal protection clause of the Fourteenth Amendment. I shall be glad to make a copy of this book, together with the study, available to this Subcommittee. I have also described briefly the Supreme Court's fabrication of a constitutional issue in the school prayer cases in a pamphlet, "Do School Prayers Violate the Constitution?", a copy of which is attached to this statement. I shall confine myself here to describe briefly how the Supreme Court created a constitutional issue in matters of abortion.

As said before, abortion is nowhere mentioned in the United States Constitution. According to the Tenth Amendment to the Constitution, the power to legislate respecting abortion belongs to the powers reserved to the States to which the judicial power of the United States does not extend. Considering such constitutional clarity, it takes inventiveness to take this power from the States without a constitutional amendment.

In 1973, the Supreme Court managed this in its decision in Roe v. Wade, 410 U.S.113, in the guise of constitutional interpretation. For this purpose, the Court first invented a constitutional right of privacy which also is nowhere in the Constitution. But Justice Blackmun, who delivered the opinion of the Court, cited a whole page full of Supreme Court decisions in which the Court had found a right of privacy in the First, Fourth, Fifth, Ninth and Fourteenth Amendments. This right of privacy, he said, was founded in the Fourteenth Amendment's concept of personal liberty and restriction upon state action. The connection with the Fourteenth Amendment was found by the Court in the word "liberty" which appears in the due process clause. This tenuous connection was supposed to protect a person from the criminal abortion laws of a state, but only during the first three months of pregnancy.

During the second trimester of pregnancy, the Court found that the State may have an interest in protecting the health of the mother. Therefore, the Court "permitted" the State to regulate the abortion procedure in ways that are reasonably related to maternal health.

During the third trimester, according to the Court's great wisdom, human life has begun. Therefore, the Court "permitted" the State to assert a compelling state interest to protect the life of the unborn child and even proscribe abortion, except where it is necessary for the preservation of the life of the mother.

The Supreme Court's decision was that "A state criminal abortion statute ... without regard to pregnancy and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." 310 U.S., at 164-165.

The due process clause of the Fourteenth Amendment reads:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law."

In my book, "The History and Meaning of the Fourteenth Amendment", pp.125-149, I have traced the due process clause from its origin in the Magna Carta of 1215, to the statute of Edward III of 1354, where the expression "due proces de lei" (translated with due process of law) first appeared, to the laws of the American Colonies, to the Fifth Amendment, and finally to the Fourteenth Amendment. When it was included in the Fourteenth Amendment, it was already over 600 years old. Its meaning had always remained the same, namely that no person could be sentenced to death, or to imprisonment, or to forfeiture of property without first having been given an opportunity to answer to the charges and have a proof procedure, today called trial, in accordance with applicable laws. In short, it guarantees to every person charged with crime a trial pursuant to law. Originally, the Supreme Court interpreted the due process clause exactly in this way. See Frank v. Magnum, 237 U.S.309, 326 (1915) and cases there cited.

Obviously, the due process clause has nothing to do with abortion. To say that any state abortion law can violate the due process clause of the Fourteenth Amendment, or any other provision of the Fourteenth Amendment, makes no sense. To make nonsense of a constitutional provision, is not constitutional interpretation. Evidently, what the Supreme Court did, was to amend the Constitution through the back door. The Constitution has given the Supreme Court no power to amend the Constitution, and there has never been a constitutional amendment pursuant to Article V of the Constitution to take from the States their retained power to legislate with respect to abortion.

## THE WORD "VOLUNTARY" IN THE SCHOOL PRAYER BILLS MIGHT DEFEAT THE PURPOSE OF THE BILLS.

Finally, it must be mentioned that S.481 and H.R.865 have a deficiency which is apt to defeat their purpose. They propose to prevent the federal courts from taking jurisdiction in matters relating to voluntary prayers in public schools and public buildings, and S.481 even has a definition added that "voluntary prayer" shall not include any prayer composed by a state official. No doubt, this was done in the mistaken belief that this could assure the voluntariness of prayers in the schools of the states. But these are merely jurisdictional bills, and the revival of school prayers in the states would depend on new state legislation.

There is no danger that the people in the states, if left to exercise their constitutional right to make their own laws with respect to prayers in their schools, free from federal interference, will enact any law which would compel a child to participate in a prayer whose parents do not want him to participate. The prayers which the Supreme Court held to be unconstitutional were completely voluntary prayers. The true reason for the Supreme Court's rulings was not that the prayers were not voluntary or were composed by a state official, but the Supreme Court's determination of forcing its ideas of "a wall of separation between church and state" on the Nation, notwithstanding the fact that there is no such requirement in the Constitution, and notwithstanding the fact that the framers of the Constitution expressly excluded the judges from any participation in law- and policy-making. 1 Farrand, The Records of the Federal Convention of 1787 97-98, 100-111.

As written, the bills do not make a clear rule for the federal courts to take no jurisdiction in cases relating to prayers in state public schools and public buildings. They qualify it by the word "voluntary", and S.481 even by a definition. Thereby they permit the federal courts to take jurisdiction whenever a plaintiff alleges that a school-prayer is not truly voluntary, and that will be in every case in which a prayer is said in a class room. The situation would be the same as before.

If the Supreme Court respected the Constitution, the word "voluntary" would make no difference, because the Supreme Court would have to say that prayers in state public schools belong to the retained rights of the states over which the Supreme Court has no jurisdiction, and it would have to dismiss the action for want of a federal question. But if the Supreme Court respected the Constitution, Congress would not have to act to re-establish constitutional conditions. But to be effective, all reference to voluntary ought to be eliminated.

## CONCLUSION.

From the foregoing discussion, it ought to be clear that congressional legislation forbidding the lower federal courts from taking jurisdiction,and the Supreme Court from taking appellate jurisdiction, in state cases relating to school prayers, school attendance because of race, and abortion would not take away any jurisdiction from the federal courts which the Constitution has given them; it would merely prevent the federal courts from taking jurisdiction in cases over which the Constitution has given them no jurisdiction. Such legislation would therefore re-establish constitutional conditions which the Supreme Court has disturbed.

## SUPPLEMENTAL STATEMENT OF HERMINE HERTA MEYER

In my above mentioned statement, I have shown that an act of Congress prohibiting the lower federal courts from taking jurisdiction, and the Supreme Court from taking appellate jurisdiction, in matters relating to abortion, school prayers, and school attendance based on race, would not divest the federal courts of any jurisdiction which the Constitution has granted them. Rather, it would prevent them from taking jurisdiction in matters over which the Constitution has not given them any jurisdiction. As a result, the people in the States would again be able to exercise their constitutional right to make their own laws in these matters, and any legal disputes could be settled in the courts of their own states.

## The Status of a Supreme Court Decision under the Constitution.

It has been argued that by congressional legislation preventing the federal courts from taking jurisdiction in the above mentioned matters, federal law would be frozen at the point of existing Supreme Court decisions, and the supremacy clause of the Constitution would bind the State courts to follow such decisions.

Such arguments attribute to a Supreme Court decision the same effect as to a provision of the Constitution. The Supreme Court itself had the audacity to do this in Cooper v. Aaron, 350 U.S.1, 18 (1958), where it declared that its interpretation of the Fourteenth Amendment enunciated in the Brown case "is the supreme law of the land and Art.VI of the Constitution makes it of binding effect on the States."

There is nothing in the Constitution, neither in its language nor in its history,which gives a Supreme Court decision the force and effect of a constitutional provision or of a generally binding law.

It would indeed be strange if the Constitution contained such a provision, because it is absolutely incompatible with the character of the Constitution and the constitutional plan.

The Constitution of the United States, like the constitutions of the original States, is based on the principle of self-government of the people. As Madison stated in No.51 of the Federalist Papers, in such a Constitution the legislative authority necessarily predominates. This is so, because its members are the elected representatives of the people.

The most important feature of such self-government is the people's participation in the law-making process, either indirectly through elected representatives, or directly through initiative and referendum. In a political system based on self-government of the people, therefore, generally binding laws can only be made by the people themselves or by their agents elected by them for that purpose who are responsible to the voters, and whom the voters can influence through direct contact or at the ballot box.

Article 1 of the Constitution says without any possibility of misunderstanding, "All legislative Powers herein granted shall be vested in a Congress of the United States." This means that the Constitution has entrusted the authority to make generally binding federal laws exclusively to persons elected by and responsible to the people, not to unelected judges appointed for life and responsible to no one.

The so-called supremacy clause appears in Article VI, clause 2 of the Constitution. It declares:

> "This Constitution, and the Laws of the United States made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Evidently, it binds the judges in the States to give superior effect to the United States Constitution, the laws of the United States, and the treaties made under the authority of the United States wherever they conflict with inconsistent provisions of the constitution and laws of their own states. The expression "laws of the United States", as used in the Constitution, means the laws enacted by the legislature of the United States, which is Congress. It should be noted that the text of the supremacy clause binds the judges of the States to accept an act of Congress as "supreme law of the land" only if made "in pursuance" of the Constitution because, as Hamilton explained in No.33 of the Federalist Papers, a law not pursuant to the constitutional powers of the federal government is an invasion of the residuary authorities of the States and will not become the supreme law of the land, but is merely an act of usurpation. This necessitates that, in a given case, the judges in the States have the power to expound the United States Constitution and the act of Congress in question in order to determine whether, in their opinion, it was made "in pursuance" of the Constitution so that they are bound by the supremacy clause to give it effect.

The supremacy clause nowhere says that a decision of the Supreme Court of the United States shall be the supreme law of the land. The Constitution has given the federal courts, including the Supreme Court, judicial jurisdiction only over certain types of "cases" and "controversies," that is the power to decide a legal dispute concerning federal questions brought properly before a court.

The only sentence in the Constitution which gives federal courts the authority to expound it, is the sentence in Article III, Section 2, Clause 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ...". It is interesting to note that at the Federal Convention of 1787, where the Constitution was drafted, Madison first opposed the insertion of this sentence into the Constitution. The draft which came out of the Committee of Detail had provided that the jurisdiction of the federal courts should "extend to all cases arising under the laws passed by the legislature of the United States." Later, Dr.Johnson of Connecticut moved that the jurisdiction be extended "to all cases arising under this Constitution." Madison expressed doubt "whether it was not going [illegible] far to extend the jurisdiction of the Court generally to cases arising under the Constitution.

But then he agreed after it was generally understood "that the jurisdiction given was limited to cases of a Judiciary nature." Madison emphasized that "the right of expounding the Constitution in cases not of this nature ought not to be given to that Department." 2 Max Farrand, The Records of the Federal Convention of 1787, p.430. This was understood to mean that the federal courts, including the Supreme Court, would have jurisdiction to interpret constitutional questions in a case brought before them, but that such interpretation would bind only the parties properly before the courts. 2 George Bancroft, History of the Formation of the Constitution of the United States of America 198. (New York 1882). The rule that a court decision binds only the parties to a suit and is not a generally binding law was the rule prevalent in the entire western world. Had the framers of the United States Constitution wanted to depart from it and make a Supreme Court decision the "law of the land," they would have said so in the Constitution.

In No.81 of the Federalist Papers, Hamilton objected to arguments that the authority of the proposed Supreme Court of the United States would be superior to the legislature because "The power of construing the laws according to the spirit of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body." Hamilton answered that there was not a syllable in the plan under consideration which entitled the national courts to such a power.

> "A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases."

Certainly, it was not intended by the framers of the Constitution that a Supreme Court decision interpreting the Constitution should take the place of the constitutional provision itself which can be changed only by a constitutional amendment.

In 1858, the status of a Supreme Court decision was involved in the famous Lincoln-Douglas Debate. The Supreme Court had decided the Dred Scott case. In a long opinion, the Court said that an act of Congress outlawing slavery in a territory bought from France was unconstitutional; that Negroes could never become citizens of the United States under the Constitution because they had not been included in the Declaration of Independence; that Scott was not a citizen who could sue in a federal court, and that therefore the Court had no jurisdiction.

Lincoln attacked the pronouncements of the Supreme Court that Negroes descending from African slaves could never become citizens of the United States and that the Constitution did not permit Congress to exclude slavery from a territory of the United States.

Douglas saw therein "a crusade against the Supreme Court of the United States." According to him, all pronouncements relating to the Constitution made by the Supreme Court, even in a case where the Court had declared it had no jurisdiction, had to be accepted as authoritative interpretation of the Constitution and the laws. For him, the Supreme Court was the ultimate arbiter of all constitutional questions.

Lincoln called this "an astonisher in legal history;" "a new wonder of the world." For Lincoln, this was "a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy:" He denied that he "resisted" the Supreme Court's _Dred Scott_ decision. The Court had decided that Scott was still a slave, and he, Lincoln, had no intention of interfering with the property by attempting to take Scott from his master. He merely denied that the Court's decision would prevent Congress from prohibiting slavery in a new territory. He refused to recognize it as "a rule of political action for the people and all the departments of the government." In short, he made the time honored distinction between an actual decision of the Supreme Court that established with finality the rights between the parties to a law suit — in the _Dred Scott_ case that Scott was still his master's property -- and a generally binding law; and he also rejected the view that a Supreme Court's interpretation of a constitutional question in an individual legal controversy was binding on everyone outside of that controversy. _Created Equal? The Complete Lincoln-Douglas Debates_ 36-37, 56, 78. Ed. Paul M. Angle. University of Chicago Press 1958.

Lincoln considered this matter of such importance that he spoke about it at his first inaugural address; he said:

> "I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit ... And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

The Lincoln-Douglas debate shows that the idea, that the Supreme Court is the ultimate arbiter of all constitutional questions, was not yet accepted at that time. Jefferson's Attorney General, Levi Lincoln, even denied that a Supreme Court decision must be blindly accepted as precedent by the Executive or other courts when they have to act in other cases. While the opinions of so high an authority as the U.S.Supreme Court deserve great deference, he said, still greater deference is due "to their (the acting authorities') own conviction of the meaning of the laws and constitution of the United States, and their oaths to support them." 1 Opinions of the Attorneys General, 119, 122.

As said before, to attribute to a decision of the Supreme Court the character of the supreme law of the land as described in the supremacy clause, would be absolutely incompatible with the character of the Constitution and with the constitutional plan. There is nothing in the Constitution which obliges the State courts to follow a decision of the U.S.Supreme Court. On the contrary, their oath of office to support this Constitution, obliges them to follow their own conviction of the meaning of the laws and constitution of the United States.

Senator HATCH. With that, we will recess these hearings until the next scheduled hearing date on this exceptions clause problem.

[Whereupon, at 11:50 a.m., the hearing was recessed to reconvene at a later date.]

# APPENDIX

## Part 1—Correspondence

The University of North Carolina at Chapel Hill,
*Chapel Hill, N.C., May 27, 1981.*

Senator Orrin G. Hatch,
*Chairman, Senate Judiciary Subcommittee on the Constitution,*
*Washington, D.C.*

Dear Senator Hatch: Once again there is active debate over that provision of Article III of the Constitution according Congress authority to fix the appellate jurisdiction of the Supreme Court "with such exceptions and under such regulations" as it shall determine. The May issue of the American Bar Association Journal refers to current developments at pages 546–547, with Bill numbers listed at page 558. Professor William Van Alstyne of Duke, who was enticed into law school teaching at Ohio State during my deanship there, has confirmed the sketchy newspaper account of Hearings held on the question last Friday, May 22.

The meaning of the constitutional provision has long engaged the attention of commentators on the Constitution. It seems so inconsistent with full-scale constitutional review by the Court, yet there appears no avoiding the clear wording of the authorization to Congress. How the provision should be interpreted has been a puzzler, with divergent views advanced by numerous theorists. The two decisions of the Court, *Ex Parte McCardle; United States* v. *Klein,* along with Justice Douglas's view as expressed in *Glidden Co.* v. *Zdanok* with the concurrence of Justice Black—these judicial opinions leave the matter in uncertainty.

With the encouragement of Professor Van Alstyne I take the liberty of calling attention to an explanation I offered some years ago. My judgment was then, and remains, that the provision was intended only to give Congress power to add or contract from the Court's appellate jurisdiction with respect to ordinary non-constitutional litigation. At the time of agreement on this provision, Court exercise of constitutional review of legislation was not yet in formal contemplation on the part of the Framers, although the concept was taking shape as a consequence of early exercise of the power by some State courts as a defensive move against legislative inroads on state judiciaries. Indeed, in my opinion the Framers did not make provision for constitutional review until late in the Convention and then only with respect to Supreme Court review of State court decisions sustaining the validity of State legislation arguably inconsistent with the Constitution of the United States. Broader scope for constitutional review gained favor in the Ratifying Conventions, but it is both far-fetched and counter productive to read into the provision in question its extension to constitutional litigation. Properly interpreted, the Constitution does not authorize Congress to make exceptions to the Court's appellate jurisdiction in constitutional cases for the purpose of blocking unwanted Court review. The puzzling provision grants to Congress wide authority only as concerns the Court's operation as a common-law body, which today is of course of far less importance than in the days of the Framers when courts functioned solely as contemplated by Montesquieu.

The above paragraph seeks to provide the essence of my view, based on a careful study of the Constitutional Convention with reference to the question at hand. My full thesis is contained in an article published ten years ago in the San Diego Law Review. Title and citation follow: "Rx For a Nagging Constitutional Headache," 8 San Diego L. Rev. 246 (1971). My last reprint is enclosed for your convenience.

Respectfully yours,

Frank R. Strong,
*Distinguished University Professor Emeritus.*

[From the San Diego Law Review, Vol. 8, No. 2]

# Rx for a Nagging Constitutional Headache

F. R. STRONG[*]

## DIAGNOSIS: CONTINUING APPREHENSION OVER SEEMING CONGRESSIONAL POWER TO CURTAIL CONSTITUTIONAL REVIEW THROUGH CONTROL OF THE SUPREME COURT'S APPELLATE JURISDICTION

Appearance of the Raoul Berger volume on Congress and the Court[1] highlights continuing concern among commentators over Congress' apparent power to strip the Supreme Court, even completely, of its power to resolve constitutional issues, whether raised below in federal or state courts. The threatening constitutional provision is the second sentence of the second paragraph of section 2 of article III. Since *Marbury v. Madison*[2] the Court's original jurisdiction is free of either Congressional contraction or extension. But "in all other cases" within the Federal judicial power as defined in the first paragraph of section 2, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as Congress shall make."[3] While the question has been at issue for a hundred years, following the Court's ruling in *Ex parte McCardle*,[4] major recent apprehension is a matter of the period since World War II. Speaking before the Association of the Bar of the City of New York in late 1948, former Justice Roberts cited several Achilles' heels in the Constitution, the most serious of which he deemed to be Congressional power to set aside the Court's appellate jurisdiction.[5] Shortly thereafter, Harrison Tweed, a noted member of the association before which the former Justice had spoken, devoted lectures at Boston University to "Provisions of the Constitution Concerning the Supreme Court of the United States," including the exceptions-regulations clause.[6] Then came Professor Henry Hart's celebrated article,[7] to be followed shortly by a study at the hands of Professor Lenoir.[8] Professor Lenard Ratner took a turn with the question just a decade ago;[9] and two years thereafter Professor Merry, a political scientist, examined the matter.[10] In the mid-1960's Professor Herbert Wechsler gave the issue his attention,[11] and during 1968 it was extensively ventilated in the Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee.[12] Now has come the detailed Berger study.[13]

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[1] R. BERGER, CONGRESS V. THE SUPREME COURT (1969). [hereinafter cited as BERGER].

[2] 5 U.S. (1 Cranch) 137 (1803).

[3] U.S. CONST., art. III, § 2, cl. 2.

Roberts and Tweed were both of opinion that Congress clearly possesses the power at least to a degree to control the course of constitutional adjudication. As the latter put it,[14]

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[4] 74 U.S. (1 Wall.) 506 (1869).

[5] Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949) [hereinafter cited as Roberts], reprinted in *Hearings*, *infra* note 12, at 654-58.

[6] Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 Boston U.L. Rev. 1 (1951) [hereinafter cited as Tweed].

[7] Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts; An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) [hereinafter cited as Hart].

[8] Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 U. Kans. L. Rev. 16 (1956).

[9] Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960) [hereinafter cited as Ratner].

[10] Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53 (1962) [hereinafter cited as Merry].

[11] Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001 (1965) [hereinafter cited as Wechsler].

[12] *Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 90th Cong., 2d Sess. (June 11-14, 1968) [hereinafter cited as *Hearings*].

[13] Since appearance of the Berger volume, Professor Forkosch has written on the topic. Forkosch, *Exceptions and Regulations Clause of Article III*, 72 W. Va. L. Rev. 238 (1970).

> Most people, including many lawyers, would think that there is not much to discuss and that the Constitution clearly gives the Supreme Court absolute jurisdiction to invalidate an act of Congress or of a state legislature as unconstitutional. There are comparatively few who recognize that under the express words of the Constitution and a flat decision of the Supreme Court [citing *McCardle*] Congress can largely, if not entirely, deprive the Court of this jurisdiction.

Roberts urged the adoption of a curative amendment to protect the Court,[15] and in this had the support not only of the Association of the Bar but also of the New York State and the American Bar Associations. Mr. Tweed must have been sympathetic to the proposal for amendment, although "in the free intellectual air" in which he spoke at Boston University, he but summarized the arguments for and against it without "attempting to persuade or even express an opinion one way or the other." The Lenoir analysis found full Congressional power, without particular reference to the much mooted proviso for exceptions and regulations. Sufficient for him was the Court-approved view that, despite the seeming thrust of the Constitutional wording and the contentions of Mr. Justice Story, federal jurisdiction derives from Congressional action within the framework of the Constitution and not from the Constitution alone.

On the other hand, Professors Hart, Merry, and Ratner, together with several witnesses at the 1968 Hearings,[16] do not concede to Congress anything like full power to withhold appellate jurisdiction for constitutional review. The well-known dialogue in the Hart "exercise in dialectic" commences with consideration of *McCardle's* reach, which the questioner reads as holding "that the appellate jurisdiction of the Supreme Court is entirely within Congressional control." The response is that it is preposterous to "treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether." But to the Questioner,

> it is so impossible to lay down any measure of a necessary reservation that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress. A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the Constitutional plan. McCardle, you will remember, meets that test. The circuit courts of the United States

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[14] Tweed, *supra* note 6, at 1.

[15] Roberts, *supra* note 5, at 3.

[16] *E.g.*, *Hearings*, *supra* note 12, at 19.

> were still open in *habeas corpus*. And the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance.[17]

Citing this last passage from the Hart-Wechsler Casebook, into which meantime it had been incorporated,[18] Professor Ratner contended in like vein. "It is not reasonable to conclude that the Convention gave Congress the power to destroy [the Court's essential] role. Reasonably interpreted the clause means 'With such exceptions and under such regulations as Congress may make, not inconsistent with the essential function of the Supreme Court under this Constitution'."[19] To this argumentation he added a quite technical one based upon dictionary meanings of the key words.

> . . . in legal context an exception cannot destroy the essential characteristics of the subject to which it applies.
>
> Regulations usually specify conditions for engaging in certain conduct and sometimes forbid a particular act, but authority to prescribe them does not ordinarily include the power to prohibit the entire sphere of activity that is subject to regulation.[20]

The Ratner thesis was rejected outright by Professor Wechsler:

> I see no basis for this view and think it antithetical to the plan of the Convention for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[21]

To Professor Wechsler it follows from the seemingly unambiguous wording of the Constitutional paragraph in question,

> that Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction. Under the *McCardle* case even a pending case may be excepted from appellate jurisdiction.[22]

At the subsequent Hearings of the Senate subcommittee, Senator

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[17] Hart, *supra* note 7, at 1364-65.

[18] H. Hart & H. Wechsler, The Federal Courts and the Federal System 312 (1953).

[19] Ratner, *supra* note 9, at 172.

[20] *Id.* at 170, 171.

[21] Wechsler, *supra* note 11, at 1005-06.

[22] *Id.* at 1005.

Ervin, the chairman, was vigorous in espousal of the position taken by Professor Wechsler:

> I have no doubt in my own mind that the Congress has complete control over the appellate jurisdiction of the Supreme Court of the United States. Some take the *Klein* case to argue to the contrary. But the *Klein* case itself recognizes expressly that the appellate jurisdiction of the Supreme Court is dependent upon an act of Congress.[23]

Moreover, the Senator likes it this way; one of the reasons for insertion of the exceptions-regulations clause was "as a check and balance which Congress can exercise to restrain the Court whenever the Court needs restraining."[24]

Among those witnesses at the Hearings in disagreement with this view, Professor William Van Alstyne spelled out, by far the most thoroughly, the case against Congressional power. Although recognizing that "the extent of that control is uncertain,"

> On balance, however, I believe that there are a series of arguments, at least three of which are very substantial, to suggest that there are very substantial limitations on the power of Congress to collapse the appellate jurisdiction of the Supreme Court in the settling of cases and controversies which seek to resolve constitutional issues.[25]

From the subsequent detailed presentation it seems that the three limitations of major substantiality are those growing out of plausible interpretations of the exceptions and regulations clause alternative to "the one which is conventionally preferred." The essence of each of these three follows:

> The first observation is this. That the phrase "with such exceptions" follows the provision which grants the Court authority to review findings of fact as well as conclusions of law. It may be reasonable to read the phrase in context as merely permitting Congress to restrict the Supreme Court from making original findings of fact, and from substituting its findings of fact for those determined by a jury below.[26]
>
> There is a second interpretation that is feasible as well. The phrase "with such exceptions and under such regulations as the Congress shall make" may be read conjunctively, that is to say exceptions and regulations conjunctively, to express the thought that Congress may determine the manner in which cases arising under the Constitution may reach the Supreme Court, without suggesting, however, that Congress could wholly forbid such cases from reaching the Court at all.[27]
>
> Finally . . . still another interpretation of the exceptions and regulations clause [is that] it may also refer back to earlier portions

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23. *Hearings, supra* note 12, at 23. *See also id.* at 22, 131-33.
24. *Id.* at 24.
25. *Id.* at 167.
26. *Id.* at 168.
27. *Id.*

> of sections 1 and 2 of article III, portions which provide first, and without qualification, that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. . . . This reading does make considerable sense to me. The Court then preserves the clearer statement in section 1 that the whole judicial power of the United States shall be [v]ested as Justice Story indicated in *Martin v. Hunter's Lessee*, leaving the Congress to determine whether the power shall be exercised in particular cases as a matter of original jurisdiction or as a matter of appellate jurisdiction and as a matter of right by way of appeal or as a matter of judicial discretion as a matter of certiorari.[28]

Attorney Berger returns to Professor Hart for guidance, in keeping with his dedication of the volume "To the Memory of Professor Henry M. Hart, Jr. Who Lit the Way."

> Professor Hart justly suggests that a literal reading of the "exceptions" clause would serve to "destroy the essential role of the Supreme Court in the constitutional plan." So far as can be gathered from the records, that was not the purpose of the "exceptions" clause.[29]

In search of the true purpose, Mr. Berger turns to debates in the ratifying conventions. "No aspect of Article III was as intensively debated in the Ratification Conventions as the 'exceptions' clause." Yet "[t]here is not the faintest intimation in the several convention records, nor in the contemporary prints, that the 'exceptions' clause was designed to enable Congress to withdraw jurisdiction to declare an Act of Congress void."[30] Rather, the prolonged debate "turned not at all on a curb on judicial 'excess,' but was solely concerned with review of matters of 'fact' " because of great fear that the provision would enable Congress to withhold jury trial in civil cases.[31] According to Mr. Berger's researches, so vigorous was the attack on the grant to the Supreme Court of appellate jurisdiction on facts as well as law that supporters of ratification turned to the immediately following exceptions-regulations clause for defense against "the imperious demand." Quoting John Marshall himself in the Virginia Convention, the clause would "go to the cure of the mischief apprehended."[32]

To adapt a familiar Holmesian phrase, to count upon Congress to prevent the Court from denying civil trial by jury would be to rely upon a slender reed. Moreover, a great weakness in this line of reasoning is that the clause for which meaning is sought appeared in article XI of the draft constitution presented by the Committee of Detail on August 6, 1787,[33] whereas the insertion of "as to both law and fact," after the words "appellate jurisdiction", occurred on August 27 when the Judiciary Article underwent consideration and amendment in several particulars.[34] This sequence raises a presumption that the exception-regulations clause was originally included, and continued, for a purpose quite different from that of limiting the Supreme Court's appellate jurisdiction in fact as well as law. Professor Merry had sought to rebut this presumption by demonstrating that "While the provision reported by the Committee of Detail did not expressly say that Congress was to have power to make exceptions and regulations both as to law and fact, substantial grounds exist for concluding that the Committee did struggle with the problem of fact issues."[35] Yet he conceded that "much of the evidence is indirect", and his two instances of "direct support", that is, the rapidity with which the law-fact addition was made on August 27 and the inclusion of a guaranty of jury trial in criminal cases in proposed article XI as submitted on August 6,[36] involve non-sequiturs. Grant that each of these are historical facts but it does not follow that either demonstrates a meaningful connection between itself and the intended function of the exceptions-regulations clause. Apparently Mr. Berger was not impressed, for he makes no reference to either the Merry article or such a contention.

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[28] *Id.* at 169.
[29] BERGER, *supra* note 1, at 286.
[30] *Id.* at 289.
[31] *Id.* at 286-87.
[32] *Id.* at 288, citing 3 J. ELLIOT, DEBATES 520, 560 (1896).

It might be contended that support for the Berger argument can be found in rejection on September 15 (during consideration of the Report of the Committee of Style) of a motion to add to paragraph three of section 2 of article III the preservation of trial by jury "as usual in civil cases."[37] Analysis of the objections, however, which were few in number and briefly considered, carries no hint whatsoever of any thought among the delegates that the addition to the third paragraph was necessary because the exceptions-regulations clause provided protection against Supreme Court review of jury-determined facts. The motion failed for the reason that in and among the States there were such variations in jury usage as to make it impossible by constitutional provision to preserve the civil jury "as usual."[38] Mr. Berger recognizes that realization of this complication lay at the heart of extensive debate in the ratifying conventions. "The difficulty, in a nutshell, was the greatly varied practice in the States respecting review of facts, not alone in jury trials but in admiralty and equity as well."[39] The effort of supporters of the proposed Constitution to allay the fears of opponents by falling back upon the exceptions-regulations clause was, as the surrounding circumstances clearly demonstrate, a makeweight contention that could not by any reasonable interpretation of the document drain that clause of other meaning.

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[33] Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 479 (1927) [hereinafter cited as Documents].

[34] *Id.* at 625.

[35] Merry, *supra* note 10, at 58.

[36] *Id.* at 58-59.

[37] Documents, *supra* note 33, at 733-34.

It is significant that Berger buttresses his attempt to explain away the disturbing clause by return to the Hart reliance upon "the purpose and structure of the Constitution" taken as a whole.[40] Brilliant man that he was, Professor Hart sensed there was something about such a grant of power to Congress that did not jibe with the instrument fashioned by the Framers, and that reconciliation lay in macroscopic rather than microscopic inquiry. There he left the matter, not so much in the belief he had found a satisfactory cure for the nagging headache as in the hope that he had identified the direction in which further research might profitably go forward. "The purpose of the discussion is not to proffer final answers but to ventilate the questions . . . ."

Meantime, the modern Court's one excursion into the issue has done nothing to alleviate the headache. In the course of his opinion for himself and Justices Brennan and Stewart, in *Glidden v. Zdanok*,[41] Mr. Justice Harlan asserted that Congressional authority to withdraw the Court's jurisdiction, as it did in *McCardle*,

> . . . is not, of course, unlimited. In 1870, Congress purported to withdraw jurisdiction from the Court of Claims and from this Court on appeal over cases seeking indemnification for property captured during the Civil War, so far as eligibility therefor might be predicated upon an amnesty awarded by the President, as both courts had previously held that it might. Despite *Ex parte McCardle*, *supra*, the Court refused to apply the statute to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional at-

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[38] *Id.*
[39] BERGER, *supra* note 1, at 287.
[40] Hart, *supra* note 7, at 293-96.
[41] 370 U.S. 530 (1962).

> tempt to invade the judicial province by prescribing a rule of decision in a pending case. *United States v. Klein*, 13 Wall. 128.[42]

By the Justice's own analysis of *Klein* it sets no limit on Congressional power under the exceptions-regulatons clause but only differentiates between withdrawal of jurisdiction by the Congress and Congressional effort, in the guise of regulating the Court's appellate jurisdiction, to "prescribe rules of decision to the Judicial Department of the Government in cases pending before it." A clearer instance of legislative encroachment upon the central province of a coordinate branch of government could not be found. *Klein* and *McCardle* have nothing substantial in common; they treat of entirely different matters. In consequence, *Klein* identifies no limits to Congressional power over jurisdiction. Mr. Justice Harlan in the quoted paragraph was just not up to his usual legal acumen.

Mr. Justice Douglas, in a dissent to *Glidden* joined by Mr. Justice Black, does no better. The distinction between the two cases, attempted by Mr. Justice Harlan, is, he says, one between a claim to personal liberty and a property claim. But today "the distinction between liberty and property (which emanates from this portion of my Brother Harlan's opinion) has no vitality even in terms of the Due Process Clause."[43] The distinction thus failing, it would appear that the supposedly stronger case for delimitation of Congressional authority (*Klein*) is now of no precedential weight and *McCardle* rules the constitutional roost! But no, we are assured that "there is a serious question whether the *McCardle* case could command a majority view today."[44] One is reminded of Mr. Justice Jackson's complaint that the more a certain matter was explained to him the less he understood it. A jurisprudence oriented to result is not likely to alleviate any kind of constitutional headache, as Mr. Justice Black has been realizing in recent years.

## RECOMMENDED TREATMENT: HEAVY DOSAGES OF DIFFERENTIATION BETWEEN CONSTITUTIONAL REVIEW AND JUDICIAL REVIEW

The term "judicial review" aptly describes the traditional functions of the third branch of Government. Principal among these are statutory or common-law interpretation, and canalization of executive discretion. Legislative promulgation or common-law precedent is reviewed to determine the thrust of statute or judge-made law, while executive implementation is reviewed for indication of abuse in the inevitable discretion involved in application of general policy to concrete situation. Uninvolved is any judicial determination of constitutionality, that is, "constitutional review;" although it was the genius of Coke and Montesquieu to appreciate the contribution to delimitation of governmental power that could be made by a strong, co-ordinate judiciary. The exercise of each of these two differentiated types of review may be on the horizontal or on the vertical.[45]

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[42] *Id.* at 568.
[43] *Id.* at 605, n.11.
[44] *Id.*

The Judiciary Article as it was reported by the Committee of Detail, article XI, bestowed upon the Supreme Court both original and appellate jurisdiction.[46] The former was in scope essentially that carried into article III of the Constitution, save for original jurisdiction over impeachments. The Court's appellate jurisdiction, "with such exceptions and under such regulations as the Legislature shall make," ran to categories of case or controversy familiar in the subsequent Constitutional grant except for four later additions, of which one was all cases arising under "this Constitution." There is no indication that the the Committee of Detail had in mind for the Supreme Court, whether in appellate or original jurisdiction, anything but the exercise of judicial review in instances deemed to be of federal dimension. Stated otherwise, that Committee was creating the third branch of the new government,[47] understandably investing the new Court with a range of power in judicial review reflecting judgment as to the proper line of demarcation between federal and state judicial authority.

When, three weeks later, the Convention delegates finally reached consideration of article XI, a number of actions were rather quickly taken. Already remarked was the express designation that the Court's appellate jurisdiction was to be "both as to law and fact." Among several additions to the Federal "Judicial power," substituted for "The Jurisdiction of the Supreme Court" in the section setting forth the categories of case or controversy assigned to the judicial branch of the new government, was insertion of that respecting constitutional cases. On this addition, as on all other actions that day of August 27, recorded debate was very brief.

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[45] Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 [hereinafter cited as Van Alstyne], is helpful to an appreciation of the several respects in which courts may function as participants in delimitation of governmental power.

[46] DOCUMENTS, supra note 33, at 479.

[47] The Notes of both James Madison and Robert Yates record that on May 30 there was consideration and approval (though not with unanimity) of the Randolph resolve "that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive & Judiciary." *Id.*, at 120-22, 740. On June 13 the Committee of the Whole in its report to the Convention made this its first Resolution, *id.* at 201, and the great influence of Montesquieu carried this view through the entire subsequent deliberations.

> Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution and whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given that Department.
>
> The motion of Doc. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.[48]

In searching Madison's notes for a reasonable explanation of Doctor Johnson's motion, and the condition on which agreement was reached, one is struck by the parallel between the evolution of what became article III and that of the Supremacy Clause. Article VIII as reported by the Committee of Detail reads as follows:

> The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitution or laws of the several States to the contrary notwithstanding.[49]

Consideration of article VIII preceded by four days that of article XI. On the 23d of August Mr. Rutledge moved an amendment "which was agreed to nem: contrad:" The amendment altered the great portion of article VIII only in capitalization and punctuation, but the article was now to open "This Constitution and the laws of the U.S. made in pursuance thereof. . . ."[50] Thus the extension to judicial power under article XI of all cases arising under the Constitution as well as under the laws and treaties of the United States followed shortly upon an identical alteration in the scope of the Supremacy Clause. From this sequence it is more than reasonable to conclude that Doctor Johnson's amendment to article XI was for the single purpose of conferring upon the Supreme Court of the United States power to exercise vertical constitutional review with respect to State court dispositions of cases involving issues under the new Constitution of the United States.

The Committee of Style, reporting on September 12, proposed no substantive alterations in article XI, now renumbered III; for the Supremacy Clause, now incorporated into new article VI, the only change was to declare the Constitution, laws and treaties of the United States to be "the supreme law of the land" rather than of "the several States, their citizens and inhabitants."[51] Debate on article III produced only rejection of the move to add right of jury trial in civil cases;[52] further consideration of article VI was lost in the pressure to terminate the Convention with a report to the Continental Congress.[53] However, in debate on the Export-Import Clause, as it came from the Committee of Style, there developed considerable concern over the reach of the prohibition on State taxes on exports. Several favored a proviso that would afford some relaxation from the prohibition. At this point.[54]

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[48] *Id.* at 625.

[49] *Id.* at 476.

[50] *Id.* at 603. The citation is to Madison's Notes. Compare the recordation of this action by Dr. James McHenry, *id.* at 942.

> Mr. Gorham and Mr. Langdon, thought there would be no security if the proviso should be agreed to, for the States exporting through other States, against the oppressions of the latter. How was redress to be obtained in case duties should be laid beyond the purpose expressed?
>
> Mr. Madison. There will be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made against injurious acts of the States. His own opinion was, that this was insufficient. A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled.

Out of the debate came the ultimate wording that "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." Significant for present purposes is the clear tie that Madison makes back to the action taken on August 27; constitutional review had been introduced into the Court's appellate jurisdiction for the limited function of control of State action inconsistent with prohibitions contained in the Federal Constitution. Later, when Hamilton came, in Number 80 of the Federalist Papers, to examine the scope of the judicial power under article III, the context in which he considered "cases arising under the Constitution" was that of vertical review of the validity of State legislative acts. The passages are most enlightening in view of the Convention action of August 27, and of Madison's understanding of it as disclosed on September 12.

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[51] *Id.* at 712.
[52] *Id.* at 733-34.
[53] According to Madison's Notes review of the report of the Committee of Style ended with article V. *See, id.* at 736.
[54] *Id.* at 717.

As to "the proper extent of the federal judicature," Hamilton's "first point" is

> that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures without some constitutional mode of enforcing the observance of them? [Citing prohibitions on the States contained in the Constitution of the United States]. No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct infractions of them. This power must either be a direct negative on the State laws or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States.[55]

Hamilton's "second point" is the "mere necessity of uniformity in the interpretation of the national laws. . . ."[56] Corresponding "with the first two classes of causes" is the extension of the Federal judicial power "To all cases in law and equity, *arising under the Constitution* and *the laws of the United States*."[57] Distinguishing between the two, Hamilton asserts that

> [a]ll the restrictions upon the authority of the State Legislatures furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the Constitution, and will have no connection with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the Constitution and not the laws of the United States, in the ordinary signification of the terms. This may serve as an example of the whole.[58]

Perhaps in these passages Hamilton does not mean to limit constitutional review wholly to the vertical dimension, although their significance cannot be denied for their indication of the type of constitutional review he believed the Constitution clearly warranted. A satisfactory judgment on his views is difficult to make with respect to the role to be played by the Supreme Court and possible lower Federal courts in effecting limitations on governmental power; some commentators have even thought they found inconsistency among the various Numbers of the Federalist in which Hamilton treated the Judiciary.[59] There is the paragraph in

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[55] THE FEDERALIST, No. 80, at 236 (Fairfield 2d ed. 1966) (A. Hamilton) [hereinafter cited as THE FEDERALIST].

[56] *Id.* at 237.

[57] *Id.* at 239.

[58] *Id.* at 240.

[59] Number 81 has been troublesome. Thus Louis Boudin interpreted

Number 78 which has always been taken as proof that he fully embraced horizontal constitutional review:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[60]

Yet the paragraph immediately preceding sounds in terms of wholly defensive use of constitutional review of the horizontal dimension.

> This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legisla-

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it as entirely contradictory to assertions in Number 78. 1 L. Boudin, Government by Judiciary 111-13 (1932) [hereinafter cited as Boudin]. Difficulty has centered on the meaning of Hamilton's denial "that the Parliament of Great Britain or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative act." The Federalist, *supra* note 55, at 244-45. Differentiation between constitutional and judicial review quickly dissipates the confusion. Hamilton was in the early portion of Number 81 responding to criticism of "the particular organization of the Supreme Court in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State [of New York]." *Id.* at 243. The passage so puzzling to Mr. Boudin was but asserting that finality of decision was a hallmark of judicial review in all three judicial systems, despite differences in judicial organization. "A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." *Id.* at 254. This is a necessary principle of judicial status under a separation-of-powers doctrine that posits the independence of a third, the judicial, branch. A largely disregarded paragraph in a later portion of Number 78 demonstrates that Hamilton grasped the vital difference between constitutional and judicial review. *Id.* 231-32.

[60] The Federalist, *supra* note 55, at 228.

> ture and the executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[61]

A limited conception of horizontal constitutional review on Hamilton's part would not be surprising; the actual exercises of it by State courts between Independence and Ratification were mostly defensive in nature. *Holmes v. Walton*[62] in 1780 and *Trevett v. Weedon,*[63] 1786, invalidated legislation restrictive of trial by jury. The decision usually regarded as the most significant precedent by Convention time was *Bayard v. Singleton*[64] in which the North Carolina court declared unconstitutional a statute of that State that sought in a class of litigation to deny to North Carolina courts the authority to engage in judicial review. Only *Commonwealth v. Caton,*[65] decided in 1782, involved judicial experimentation with invalidation of legislative action not directed at the judicial department, and there are features of it which sharply curtail its relevance. Louis Boudin challenged the authenticity of the case.[66] Assuming its authenticity it technically concerned formal, not substantive, constitutional review;[67] and the major legislative-judicial clash in Virginia, the remonstrance of the Court of Appeals to the General Assembly, concerned a refusal of the State judges to act under certain legislation of the Assembly because that legislation was asserted to interfere with the independence of the judicial branch under the Virginia constitution.[68]

Similar ambivalence marks the Convention debates, despite Mr. Berger's irritation with those who press the point. To him the doubts of Boudin-Crosskey-Corwin as to whether the intent of the Framers went beyond judicial self-defense are unjustified, yet the ghost will not down. Thus

> Professor Hart's crushing refutation should have given "self-defense" its *coup de grace*, notwithstanding which Professor Westin has since referred to the *problem* whether "the Court could go beyond defense of its own prerogatives."[69]

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[61] *Id.* at 227. The remainder of the paragraph is omitted.

[62] Reported in C. Haines, The American Doctrine of Judicial Supremacy 92 (1932).

[63] 2 Chandler Crim. Trials 269 (1844).

[64] 1 N.C. 5 (1787).

[65] 4 Call. (Va.) 5 (1782).

[66] Boudin, *supra* note 59, Appendix C.

[67] Formal constitutional review, ordinarily referred to as formal judicial review, is concerned with legislative adherence to constitutional requirements for the enactment of legislation. It is defined in Corwin, *Judicial Review*, 8 Encyc. Soc. Sci. 475, 463 (1932), and further considered in F. Strong, American Constitutional Law 385-86, 1015-19 (1950) [hereinafter cited as Strong].

[68] 1 Va. Cases 98 (1788).

[69] Berger, *supra* note 1, at 155.

It is familiar history that on May 29 Governor Randolph proposed to the Convention fifteen Resolutions, of which the eighth was

> Res.d that the Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by        of the members of each branch.[70]

On June 4 this Resolution came before the Convention, sitting "In Committee of the Whole." Both Madison and Yates took notes on debate with respect to the first half of the Resolution. The notes vary, Madison's being the fuller, but there is no disagreement between them as to views expressed or actions taken. From Yates:

> Mr. Gerry objects to the clause—moves its postponement in order to let in a motion—*that the right of revision should be in the executive only.*
>
> Mr. Wilson contends that the executive and judicial ought to have a joint and full negative—they cannot otherwise preserve their importance against the legislature.
>
> Mr. King was against the interference of the judicial—they may be biased in the interpretation—He is therefore to give the executive a complete *negative.*
>
> Carried to be postponed, 6 States against 4—New York for it.[71]

The Madison notes expand on Mr. Gerry's views as follows:

> Mr. Gerry doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check ag.st encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being ag.st the Constitution. This was done too with general approbation. It was quite foreign from the nature of y.e office to make them judges of the policy of public measures. He moves to postpone the clause in order to propose "that the National Executive shall have a right to negative any Legislative act which shall not be afterwards passed by        parts of each branch of the national Legislature."[72]

The notes of Rufus King for June 4 take up with the ensuing motion of Mr. Gerry "to postpone the article for a Council of Revision, and to vest a qualified Negative in the Executive." King records that upon adoption of the motion, "by all States except Cont. & Mard.," several delegates spoke in opposition to a motion by Hamilton and Wilson that the Negative be complete, after which the latter went down to defeat with only the movers, and King, in support. Then, according to the King notes, Madison delivered himself as follows:

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[70] DOCUMENTS, *supra* note 33, at 118.
[71] *Id.* at 752.
[72] *Id.* at 147.

> The judiciary ought to be introduced in the business of Legislation—they will protect their department, and united with the Executive make its negatives more strong. There is weight in the objections to this measure—but a check on the Legislature is necessary . . . . We must therefore introduce in our system Provisions against the measures of an interested majority—a check is not only necessary to protect the Executive power, but the minority in the Legislature. The independence of the Executive, having the Eyes of all upon him will make him an impartial judge—add the Judiciary, and you greatly increase his respectability.[73]

From the above it is quite apparent that the extended consideration of the merits of a Council of Revision began with the view that any judicial participation in it would be for the purpose of protecting the Judiciary against encroachments by the National Legislature, exactly in line with judicial development of the period. A recombing of subsequent debates will not be undertaken here; the Berger review is inadequate in itself but footnotes to numerous more comprehensive searches including that of his idol, Professor Hart.[74] It suffices to observe that in subsequent consideration some delegates did appear to carry the concept of horizontal constitutional review beyond the defensive to embrace all manner of acts of Congress. However the evidence of abandonment of the original view of the limited function of that type of review does not compel the crucial contention of Berger and others that in passing without debate Doctor Johnson's motion of August 27, adding "all cases arising under this constitution," the delegates intended to legitimate the full range of horizontal constitutional review. Indeed, it is not at all clear that the motion was intended to provide for any degree of constitutional review of the horizontal type. As has been demonstrated,[75] the convincing evidence is that the Framers were there making provision only for Supreme Court exercise of vertical constitutional review.

There is no indication whatsoever that in adding the vertical segment of constitutional reviewing power to the Supreme Court's appellate jurisdiction, the Convention delegates sensed any conflict between such an extension and Congressional power over that jurisdic-

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73. *Id.* at 848.
74. Berger, *supra* note 1, at 154-65.
75. *See* text accompanying note 47, *supra.*

tion. They had, by another action on August 27, seen a conflict between legislative authority with respect to judicial jurisdiction and legislative authority over the judicial function. Seemingly anticpating the problem of *Klein*, "The following motion was disagreed to, to wit to insert 'In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct.' "[76] But with respect to the categories of case or controversy originally included within the Court's appellate jurisdiction for purposes of judicial review, it was of the essence of good sense to leave to the legislative branch authority to make exceptions to, as well as regulations for, that jurisdictional bulk. There was double good sense for such a provision in light of the provision, in the draft of the Committee of Detail, authorizing the federal legislature to create inferior federal courts should it see fit to do so.

To leave to the legislative branch the power to undercut effective implementation of the Supremacy Clause is of a wholly different dimension. It is conceivable that the delegates saw no conflict because they could not conceive that a department of the new federal government would ever be disposed to take such action. It is far more likely, however, that tired from three weeks of intensive consideration of the complete draft for a Constitution submitted by the Committee of Detail, and attempting in one day to review and resolve six proposed alterations in the Judiciary Article, the delegates did not realize they were by Doctor Johnson's amendment giving the left hand power to take away that which they had given with the right hand in the interest of federal supremacy. In the clarity afforded by this narrow focus, there is presented an issue of internal inconsistency of a nature justifying preference for an interpretation of the constitutional paragraph guaranteeing judicial power vertically to review for constitutionality over the interpretation granting legislative power to withhold such appellate jurisdiction. Reliance could properly be placed on Professor Hart's thesis that the exceptions-regulations clause cannot rightly be permitted to destroy the Court's essential role in the constitutional plan because that thesis is now domesticated in a specific context that removes much of its self-serving, "must have been" generalization with respect to Framer intent in the face of unexplained constitutional language to the contrary.

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[76] DOCUMENTS, *supra* note 33, at 625.

Near-contemporaneous action by the First Congress, in which sat many of the former Convention delegates, may offer the most satisfactory resolution of the issue of more precise limits under this general proposition. The celebrated section 25 did not exhaust the total reach of the Constitutional grant to the Supreme Court of its appellate jurisdiction over State courts. Familiar is the final sentence of section 25:[77]

> But no other error shall be assigned or regarded as ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commission, or authorities in dispute.

Congress here restricted vertical constitutional *and* judicial review to federal questions, whereas article III extends the Court's appellate jurisdiction to "all cases . . . arising under this Constitution, the Laws of the United States, and Treaties made. . . ." By the Act of 1867 Congress omitted this last sentence, presumably in line with its general determination to extend Federal authority over the States. By a Herculean act of statutory misinterpretation, rivaling his earlier performance at the level of constitutional interpretation in the *Slaughter-House Cases*,[78] Mr. Justice Miller managed the conclusion that no change in the scope of the Court's appellate jurisdiction vis-à-vis State courts had been intended.[79] But the Congressional power was there, as the majority did not deny,[80] as Mr. Justice Bradley asserted in dissent,[81] as Justices Clifford and Swayne assumed in their dissent,[82] and as ex-Justice Curtis convincingly contended in his brief amicus curiae.[83]

There continues to this day this Congressional exception to the full reach of the Court's appellate jurisdiction over State courts *in re* constitutional review, as given by the Constitution.[84] Coming down to *us* as it does from 1789, it can with much justification be taken as the intended guide to the extent of Congressional authority under the substantive portion of the exceptions-regulations clause. At the Subcommittee Hearings Professor Gunther put the point well by way of further illustration:[85]

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[77] 1 Stat. 73, 85-87 (1789).

[78] 83 U.S. (16 Wall.) 36 (1873).

[79] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

[80] *Id.* at 638.

[81] *Id.* at 641-42.

[82] *Id.* at 638-39.

[83] B. CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 59-63 (2d ed. 1896).

[84] 28 U.S.C. § 1257, restricting Supreme Court review to those situations where, in "the highest court of a State in which a decision could be had," there is "drawn in question" the validity of a treaty or statute of the United States, or the validity of a State statute, or "where any title, right, privilege or immunity is specially set up or claimed under Federal Constitution, statute, treaty, commission or authority." Section 2 of article III of course extends to "all cases" arising under the Constitution, laws and treaties of the United States. *Cf.* Tracy v. Ginsberg, 205 U.S. 170 (1907), assuming reviewing authority under diversity of citizenship.

> For a good many years in our history, lots of cases arising in the State courts, for example, involving Federal issues could not be brought to the Supreme Court. They cannot all be brought to the Supreme Court now.
>
> For example, the restriction involved in the old section 25 of the Judiciary Act in 1789 meant that, until the 20th century, cases in which the Federal right was denied in the State court did not go to the Supreme Court. These were after all restrictions of a substantive nature.
>
> They were not simply procedural matters as to when you file a case or how you prepare a case or how you raise the issues. I think they were of great substantive significance in the sense that a very large bulk of potential Supreme Court material did not get to the Supreme Court because of the congressional failure to vest the whole jurisdiction.
>
> I don't think it follows from that, that any kind of congressional control of appellate jurisdiction therefore must be permissible.

So far as the Framers were concerned, then, provision for constitutional review was incorporated into the Supreme Court's appellate jurisdiction for the single explicit purpose of providing an effective deterrent against State enactments, legislative or constituent, inconsistent with the new Constitution of the *United States* yet bearing the imprimatur of a State's Judges. But until ratified the document was only "a scrap of paper" and what the Ratifiers understood in making it an operative instrument of governance is another matter. From his exhaustive study Berger is convinced that ratification was achieved on the understanding that horizontal constitutional review of Acts of Congress was assured by article III's extension of judicial power to all cases arising under the Constitution. Debates in and accompanying the ratifying conventions, he asserts, reveal both great demand for Court invalidation of Congressional acts violative of the Constitution and assumption that the document provided that power; "A restrictive reading of the 'arising under' clause can not be extracted from textual compulsions";[86] therefore, Q. E. D.

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[85] *Hearings*, *supra* note 12, at 17.
[86] BERGER, *supra* note 1, at 217.

Accepting the accuracy of the Berger findings with respect to the great debates on ratification and granting that on its face alone, without contextual setting, the phrase in question can carry the broader meaning, nevertheless the Berger contention experiences three major difficulties. First, if article III embraces horizontal constitutional review—and concededly there is no other provision on which such judicial power can be rested—it immediately becomes subject, save as capable of exercise through the Court's original jurisdiction, to Congressional authority to make exceptions thereto. All effort, whether by Mr. Berger, Professor Van Alstyne, or others, to be rid of the irritant exceptions-regulations clause by contending that it was designed to take the sting from the law-and-fact clause is unconvincing, as has been shown. Article III is a veritable trap for those who understandably feel better if they can persuade themselves that the Constitution did indeed incorporate horizontal as well as vertical constitutional review.

Secondly, while the debates over ratification may be taken as indicating the appeal of extension to the horizontal level of the judicial power to rule with finality on issues of constitutionality, the evidence presented by Mr. Berger[87] does not convincingly demonstrate that the Constitution as ratified *must* be read as itself textually incorporating such a broadened conception of the part that the third branch of the new Government was to play under that Instrument. There is a serious variance between pleading and proof. The same criticism is to be made of Berger evidence that the growing acceptance of constitutional review of acts of Congress can be traced in the First Congress.[88]

A final difficulty in the Berger-type thesis lies in the irreconciliability of the asserted clarity of documentary inclusion of horizontal constitutional review with the travail involved in full establishment of Supreme Court authority to review Acts of Congress for consistency with the Constitution. On its facts *Marbury v. Madison*[89] established only that the Court had the power to declare unconstitutional Congressional action allegedly encroaching on the Court's own bailiwick as the third branch of the new Government. In a word, the exercise of constitutional review was defensive, strikingly like the North Carolina court's holding in *Bayard v. Singleton*,[90] to which Louis Boudin, in his monumental attempt to disprove the legitimacy of constitutional review, took no exception.[91]

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[87] *Id.* ch. 4.
[88] *Id.* ch. 5.
[89] 5 U.S. (1 Cranch.) 137 (1803).
[90] Cited *supra* note 64.
[91] BOUDIN, *supra* note 59, at 66.

Professor Van Alstyne is quite correct that Chief Justice Marshall was by dictum after much bigger game.[92] But convincing demonstration of textual basis for the exercise of affirmative constitutional review of Acts of Congress was more than a match for even Marshall's great talents, and acceptance of this power in the Supreme Court has had to come more by faith than by proof.

Careful differentiation between constitutional review and judicial review lays basis for understanding why the Marshall dictum in *Marbury* has experienced such difficulty in its metamorphosis into unquestioned doctrine. In his brilliant although unappreciated dissent in *Eakin v. Raub*,[93] Mr. Justice Gibson had no difficulty at all with the vertical constitutional review involved in testing State legislative action against the norms of the Federal Constitution.

> By becoming parties to the federal constitution, the states have agreed to several limitations of their individual sovereignty, to enforce which, it was thought absolutely necessary to prevent them from giving effect to laws in violation of those limitations, through the instrumentality of their own judges.[94]

Then quoting in full the Supremacy Clause, Gibson continued

> This is an express grant of a political power and it is conclusive to show that no law of inferior obligation, as every state law must necessarily be, can be executed at the expense of the constitution, laws, or treaties of the United States.[95]

It followed that even the Pennsylvania Judges must exercise this "political power" of constitutional review to the extent of determining the consistency of any Pennsylvania legislative act with the Federal Constitution. But this "is not all," for by article III thereof, implemented by Act of Congress, the Supreme Court has appellate jurisdiction over State court determinations to the extent of their involvment of federal questions.

> This is another guard against infraction of the limitations imposed on state sovereignty, and one which is extremely efficient in practice; for reversals of decisions in favour of the constitutionality of acts of assembly, have been frequent on writs of error to the Supreme Court of the United States.[96]

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[92] Van Alstyne, *supra* note 45, at 34-36.

[93] 12 Serg. & R. (Pa.) 330, 343, 358 (1825).

[94] *Id.* at 355-56.

[95] *Id.* at 356.

[96] *Id.* Gibson could have had in mind McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.)

But to Mr. Justice Gibson the claim by a judiciary, whether State or Federal, of power to exercise horizontal constitutional review was quite another matter. Extensive quotation is essential to full understanding of the Gibson reasoning.[97]

> It seems to me, . . . there is a plain difference, hitherto unnoticed, between acts that are repugnant to the constitution of the particular state, and acts that are repugnant to the constitution of the United States; my opinion being, that the judiciary is bound to execute the former, but not the latter. I shall hereafter attempt to explain this difference, by pointing out the particular provisions in the constitution of the United States, on which it depends. I am aware, that a right to declare all unconstitutional acts void, without distinction as to either constitution, is generally held as a professional dogma; but, I apprehend, rather as a matter of faith than of reason. I admit, that I once embraced the same doctrine, but without examination, and I shall, therefore, state the arguments that impelled me to abandon it, with great respect for those by whom it is still maintained. But I may premise, that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall, (in Marbury v. Madison, 1 Cranch, 176); and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend. . . . The constitution is a collection of fundamental laws, not to be departed from in practice, nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of *communis error*, which affords a ready justification for every usurpation that has not been resisted in *limine*. Instead, therefore, of resting on the fact, that the right in question has universally been assumed by the American courts, the judge who asserts it ought to be prepared to maintain it on the principles of the constitution.
>
> I begin, then, by observing, that in this country, the powers of the judiciary are divisible into those that are POLITICAL, and those that are purely CIVIL. Every power by which one organ of the government is enabled to control another, or to exert an influence over its acts, is a political power. The political powers of the judiciary are *extraordinary* and *adventitious*; such, for instance, as are derived from certain peculiar provisions in the constitution of the United States, of which hereafter; and they are derived, by direct grant, from the common fountain of all political power. On the other hand, its civil, are its *ordinary* and *appropriate* powers; being part of its essence, and existing independently of any supposed grant in the constitution. But where the government exists by virtue of a *written* constitution, the judiciary does not necessarily derive from that circumstance, any other than its ordinary and appropriate powers. Our judiciary is constructed on the principles of the common law, which enters so essentially into the

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518 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). In these and other decisions of his time on the Court, Marshall was, after *Marbury*, concerned with vertical constitutional review of State action challenged as violative of the commerce or contract clauses of the Constitution of the United States.

[97] The following passages appear id. at 344-51.

> composition of our social institutions as to be inseparable from them, and to be, in fact, the basis of the whole scheme of our civil and political liberty. In adopting any organ or instrument of the common law, we take it with just such powers and capacities as were incident to it at the common law, except where these are expressly, or by necessary implication, abridged or enlarged in the act of adoption; and that such act is a written instrument, cannot vary its consequences or construction. . . . Now, what are the powers of the judiciary at the common law? They are those that necessarily arise out of its immediate business; and they are, therefore, commensurate only with the judicial execution of the municipal law, or, in other words, with the administration of distributive justice, without extending to any thing of a political cast whatever. . . . With us, although the legislature be the depository of only so much of the sovereignty as the people have thought fit to impart, it is, nevertheless, sovereign within the limit of its powers, and may relatively claim the same pre-eminence here that it may claim elsewhere. It will be conceded, then, that the ordinary and essential powers of the judiciary do not extend to the annulling of an act of the legislature. Nor can the inference [to] be drawn from this, be evaded by saying that in England the constitution, resting in principles consecrated by time, and not in an actual written compact, and being subject to alteration by the very act of the legislature, there is consequently no separate and distinct criterion by which the question of constitutionality may be determined; for it does not follow, that because we have such a criterion, the application of it belongs to the judiciary. I take it, therefore, that the power in question does not necessarily arise from the judiciary being established by a written constitution, but that this organ can claim, on account of that circumstance, no powers that do not belong to it at the common law; and that, whatever may have been the cause of the limitation of its jurisdiction originally, it can exercise no power of supervision over the legislature, without producing a direct authority for it in the constitution, either in terms or by irresistible implication from the nature of the government: without which, the power must be considered as reserved, along with the other ungranted portions of the sovereignty, for the immediate use of the people.

Having demonstrated the basic distinction, in nature and source of the power, between judicial review and constitutional review, Mr. Justice Gibson continued:

> The constitution of Pennsylvania contains no express grant of political powers to the judiciary. But, to establish a grant by implication, the constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way; this is conceded. But it is a fallacy, to suppose that they can come into collision *before the judiciary*. . . .
>
> Now, as the judiciary is not expressly constituted for that purpose, it must derive whatever authority of the sort it may possess,

> from the reasonableness and fitness of the thing. But, in theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior capacity only for those things which peculiarly belong to it; and as legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws when made, involves only the construction of the laws themselves, it follows, that the construction of the constitution, in this particular, belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts. But suppose all to be of equal capacity, in every respect, why should one exercise a controlling power over the rest? That the judiciary is of superior rank, has never been pretended, although it has been said to be coordinate. It is not easy, however, to comprehend how the power which gives law to all the rest, can be of no more than equal rank with one which receives it, and is answerable to the former for the observance of its statutes. Legislation is essentially an act of sovereign power; but the execution of the laws by instruments that are governed by prescribed rules, and exercise no power of volition, is essentially otherwise.

Later, as Chief Justice of the Pennsylvania Supreme Court, Gibson presumably abandoned his position in *Eakin*, partly because of general acceptance of "the pretensions of the courts" and partly "from experience of the necessity of the case."[98] The two given reasons would appear to point in the same direction:

> The fault line in the logic of the "dissent" . . . lies in this—that the presence in American constitutions of separation-of-power provisions looking to continuance of judicial [review] does not, as Justice Gibson then supposed, necessarily negative intendment that the judiciary also assume the entirely new and different role of constitutional interpreter and adjudicator.[99]

There is no basis for the assertion that the new judicial role was the consequence of judicial usurpation; the evidence to the contrary is convincing. But the evidence is equally convincing that clear differentiation of the new role from the old was slow in coming and that once achieved, a basis for constitutional review must be "read back" into a document predicated primarily upon conception of the judicial role as that of the exercise of judicial review.

Further testimony to the continuing difficulty of clear differentiation is furnished by Professor Edward S. Corwin, the political scientist whose views on constitutional matters were in his time more influential than those of most constitutional lawyers. Invited to prepare the topic of "Judicial Review" for the original Encyclopedia of the Social Sciences, Professor Corwin wrote that while the "official theory" of judicial review (that is, constitutional review)

> accounts sufficiently for the power of the court to decide cases by

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[98] Norris v. Clymer, 2 Pa. 277, 281 (1845).

[99] STRONG, *supra* note 67, at 116.

> rules drawn directly from the constitution, it does not account for the fact that such rules are generally regarded as binding the legislature in the shaping of future legislation. To explain this, the essential feature of judicial review, one must fall back upon a somewhat mystical notion of the relation of judges to law.[100]

The necessity in 1932 of reliance upon "a mystical notion" to explain "the essential feature" of at least horizontal constitutional review constitutes a telling indication of the difficulty of accommodating the Court's new role with traditional views of the judicial function. Only in the new, contemporary International Encylcopedia of the Social Sciences does differentiation of function begin to emerge.[101]

So with the Supreme Court itself, the emancipation of constitutional review has been slow and tortuous. One need but recall the final paragraph of *Massachusetts v. Mellon*,[102] to which even Mr. Justice Brandeis noted no exception:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be uncon-

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100. Corwin, *supra* note 67, at 457.
101. Tanenhaus, *Judicial Review*, 8 INT'L ENCYC. SOC. SCI. 303 (1968).
102. 262 U.S. 447 (1920).

> stitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.[103]

It is a far cry from such a view of the Court's position in the governmental system to that twice expressed by the Warren Court. Although *Cooper v. Aaron*[104] was the Court's response to renewed assertions of the outworn doctrine of interposition, the opinion of the Court by the nine individual Justices reached beyond reaffirmation of their authority in vertical constitutional review.

> Article VI of the Constitution makes the Constitution the "supreme law of the land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "it is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.[105]

In three sentences not only is Marshall's trial-balloon dictum at long last enshrined as "basic principle" but the Court makes bold to claim that there has never been any question about it! The step from the defensive, almost apologetic explanation of *Marbury* to the assertive, historically inaccurate declaration of *Cooper* is truly Bunyanesque. A baker's dozen of years since, in litigation involving the exercise of horizontal constitutional review, Chief Justice Warren, in *Powell v. McCormack*,[106] makes the whole travail seem to have been so unnecessary.

> Respondents' alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a "potentially embarrassing confrontation between coordinate branches" of the Federal Government. But, as our interpretation of Art. I, § 5, discloses, a determination of Petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of respect due [a] co-ordinate branch of government," nor does it involve an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr* . . . Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.[107]

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[103] *Id.* at 488–89.

[104] 358 U.S. 1 (1958).

[105] *Id.* at 18.

[106] Powell v. McCormack, 395 U.S. 486 (1969).

[107] *Id.* at 548–49.

But simplistically obvious as judicial authority for constitutional review was to the Warren Court, it required one century and most of a second to achieve its domestication in the American constitutional framework. It was far from easy to come by, given the emphasis in the late eighteenth century on the political theory of separation of powers and the essentiality of its incorporation into American constitutions through provision for the broad exercise of judicial review. Domestic hindsight is treacherous here as in any interpretational context; so are deductions from the ease and rapidity with which other nations borrowing from us have grasped the distinction between the two types of review, even to the extent of establishing separate courts for the exercise of judicial and of constitutional adjudication. The only adequate explanation for the ultimate in constitutional review, the horizontal, is that as with Topsy it "just grew" until it forced a fulsome recognition of its own unique character and justification. To this functional view Learned Hand gave the adherence of his impressive intellectual strength. Although necessarily ineffective in his criticism of this view, Mr. Berger does accurately summarize it:[108]

> In his 1958 Lectures, Judge Hand, though "unwilling to rest on the historical evidence," was prepared to "interpolate" a power of judicial [i.e. constitutional] review in order to "keep the States, Congress, and the President within their prescribed powers." Otherwise Congress would have been "substantially omnipotent" and the government "would almost certainly have foundered." This, he stated, is "not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation."

## PROGNOSIS: RELIEF FROM THE NAGGING HEADACHE

Embrasure of the interpolative justification of horizontal constitutional review will bring quick and lasting relief. For under this approach there is no technical reliance upon the "arising under" clause and therefore no problem of conflict with the exceptions-and-regulations clause. Rather, horizontal constitutional review is understood as an evolutionary aspect of a constitutional plan understandably still incomplete in total construct at the time of drafting and ratifying the fundamental law of the new Nation.

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[108] BERGER, *supra* note 1, at 219, *quoting* from L. HAND, THE BILL OF RIGHTS 14-15 (1958). It is to be noted that Judge Hand did not find in the historical document basis for even vertical constitutional review.

**Consistent with the mature vision of Henry Hart as to "the essential role of the Supreme Court" in that constitutional plan, lodgement for the horizontal aspect of constitutional review can be found in the interstices of the Constitution as an instrument conceived in the womb of time for the realization of human liberty through the fashioning of effective limitations on the power of Government. Such intangible lodgement, although unsatisfactory to those literalists who feel insecure in the absence of explicit chapter and verse, constitutes the best guarantee of full judicial power in the Supreme Court to determine the constitutionality of behavior by all organs of the Federal Government free of headache over the existence of seeming constitutional basis for its partial or complete destruction by Congressional decree. Together with limitations on Congressional power to circumscribe vertical constitutional review that are deducible from historical events of 1787-1789, this view would restrict Congressional intervention to constructive legislative measures, akin to those now resident in 28 U. S. C., deemed necessary and proper to the most satisfactory effectuation of constitutional, as well as judicial, review.**

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DICKINSON COLLEGE,
*Carlisle, Pa., May 21, 1981.*

Hon. ORRIN G. HATCH,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR: I read with interest your *Washington Post* essay on the Court and the Constitution. I have written a short essay which deals with the same problem and I take the liberty of enclosing it herewith. I have also finished a manuscript (which will be published next year by the University of Chicago Press) on the Supreme Court's use of the equity power in imposing its policy choices through judicial decree. I would be pleased to send a copy should you think it useful to your diliberations on this subject.

With best wishes,
Sincerely,

GARY L. MCDOWELL
*Assistant Professor, Department of Political Science.*

Enclosure.

## AMENDING OUR WAYS: REFLECTIONS ON NOT AMENDING THE CONSTITUTION

(By Gary L. McDowell, Department of Political Science, Dickinson College)

Advocating amendments to the Constitution is becoming increasingly popular on both sides of the political fence. The most volatile issues in American politics—abortion, busing, and prayer in public schools—have brought forth vocal and influential proponents on both sides of the questions who argue that the only way to solve the problems is to amend our fundamental charter, either to prohibit such policies once and for all or to bring them under its protection. Whatever one's predilections, whether one is for or against abortion, busing, or school prayer, the popular fascination for amending the Constitution for such single-issue reasons should be troubling. It points to a general decay in our understanding of how a constitution differs from ordinary law; further, and more importantly, it suggests that as a people we have lost faith in republican politics.

The inclination to amend the Constitution freely and frequently is, in large part, a frustrated response to an increasingly active judiciary whose opinions no longer seem to have any connection with the theory of republican government embraced by the Constitution. The problems to which the proponents of amendments seek solutions are the result of Supreme Court decisions such as *Roe* v. *Wade* (1973), *Swann* v. *Charlotte-Mecklenburg Board of Education* (1971), and *Engel* v. *Vitale* (1962). It is believed that the Constitution needs to be amended in order to clear the constitutional waters muddied by the Court. Such is not the case. What is more important than amending the Constitution on any one of the single issues is to correct the source of the problem. Amending the Constitution for single-issue reasons is to treat symptoms at the expense of curing causes.

The cause of the confusion is our acquiesence in the face of judicial activism. Our tendency—and on the whole it is a commendable tendency—to deter to what Alexis de Tocqueville called the "moral force" of the Court has dulled our understanding of that branch of our government. We too readily believe that the Constitution is only what the judges say it is. But it is not; the Constitution is more than that. It has a meaning deeper and more permanent than the fluctuating opinions of the judges. It has a theory of politics that is as sound today as when the Philadelphia Convention in 1787 sent it off to the states for their approval. What we seem to have forgotten is that at the core of that theory of politics lay a fundamental truth about popular government: All power—judicial as well as legislative and executive—is of an encroaching nature. Left to themselves, all political men will go as far as they can in pursuit of their view of the political good. We have lost sight of the fact that the judiciary is fundamentally a political body and subject to error of judgment no less than the other branches. The enthusiasm for amending the Constitution stems from our inability to remember that we may legitimately say "No!" to the Court. If we can recover this notion in the Congress and the Presidency, then we will be moving toward curing causes rather than merely treating symptoms.

Constitutionally, the judiciary is, as Alexander Hamilton claimed in The Federalist, the branch "least dangerous to the political rights of the Constitution." But it is only the least dangerous (notice Hamilton did not suggest that it was simply not dangerous) if it exercises its legitimate function—judgment. Of a right, it has no power to exercise its independent political will. Admittedly, the line between the exercise of the will and the exercise of the judgment is at best a blurred one. But what Hamilton had in mind was unambiguous. The function of the Court is to patrol the constitutional boundaries of the other branches (the legislature especially) and to keep them within their prescribed limits. The purpose of the judicial power was to insure that the limited Constitution remained limited. As Hamilton put it, the courts are the "bulwarks of a limited constitution." The essence of judicial power was intended to be proscriptive. Should the Court endeavor to exercise its will and assert the primacy of its views over those of the legislature, it would be engaging in an illegitimate activity. Instead of being proscriptive and marking out the limits established by the Constitution, the Court would be behaving in a prescriptive way and redefining the limits of the Constitution. Instead of being a bulwark of a limited constitution it would become the vanguard of an unlimited one.

To the Founding generation (at least to the more successful Federalists) this was not a real danger. The Constitution only marks out the judicial power; it leaves to Congress the power to mark out the judicial process. It was understood that by controlling the process of the Court, Congress would serve as a republican check on this least republican of our institutions. Through the power to make exceptions to the appellate jurisdiction and the power to establish rules of procedure, Congress holds a powerful weapon with which to counter any expression of a judicial will and with which to return a wandering Court to the republican fold. The problem is that Congress has shirked its duty.

The problem of judicial activism is not a judiciary behaving in an unexpected manner. The judges are men and are behaving as we must expect all men in such positions of power to behave. Judicial activism is not a problem of judicial usurpation; it is a problem of congressional abdication. It is the result of Congress failing to exercise its constitutional prerogatives over matters of jurisdiction and procedure.

The area of congressional control of the Court's appellate jurisdiction has been explored and debated at some length. In the most notable case of Congress choosing to flex its political muscle over the Court, *Ex Parte McCardle* (1867), the Court backed down. There is no longer much doubt that this particular approach can work. But there is another way, in some repects more appropriate, that has been virtually ignored by Congress. Since the Process Acts of the First Congress, there has been a tradition in Congress to delegate to the Supreme Court the power to formulate the rules of procedure for itself and all lower federal courts. This delegation has encouraged the judicial excesses which are now being countered by threats of constitutional amendments. The problem can be addressed far less drastically by Congress merely reasserting its constitutional power to regulate the judicial process; and then finding the political courage to do so.

Rather than look to amending the Constitution, we must begin to look toward the political process for a redress of our political grievances against judicial interpretations of the Constitution. By resuscitating the doctrine of separation of powers with its inherent doctrine of "partial agency", Congress can reassert its legitimate power to hem in the judiciary while at the same time reviving the faith of the American people in American politics by renewing our confidence that we are truly self-governing.

The issues that are prompting the attempts to amend the constitution are issues that should be debated in Congress, not argued before the Court. They are issues not of constitutional right but of public policy. To amend the Constitution in light of single-issue politics will weaken its authority by diminishing the distance between the Constitution and ordinary law. There is, and there must be understood to be, a qualitative difference between a constitution and a digest of laws. A Constitution must deal with broad considerations of power, not with single manifestations of the exercise of that power.

Amending for single-issue reasons will have a politically pernicious effect. It will establish a dangerous precedent; it will encourage additional amendments in the same vein. The Constitution will come to be seen as merely another body of law so easily changeable as to be meaningless. The substantive meaning of the Constitution will be lost to concerns over its malleability. It will cease to be venerated by the people as fundamental law, and it will lose that popular prejudice without which even the most enlightened regimes find it difficult to govern.

What we need to amend is not the Constitution, but the way we think of the Constitution.

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THE LAW CENTER,
UNIVERSITY OF SOUTHERN CALIFORNIA,
*Los Angeles, Calif., May 28, 1981.*

Re: Hearings before the Senate Subcommittee on the Constitution: Congressional power over the Supreme Court's appellate jurisdiction.

Senator ORRIN HATCH,
*Chairman, Senate Subcommittee on the Constitution,*
*Senate Office Building, Washington, D.C.*

DEAR SENATOR HATCH: Because I was the first to testify before the Subcommittee on May 20, I did not have the opportunity to reply to those who followed me on that date. I was not present on the following day, but have been furnished with the statement of William Van Alstyne. I am therefore taking the liberty of submitting this supplemental statement in response to some of the comments that relate to my position.

(1) *The ambiguity of "essential functions".*—The essential functions test has been criticized as too ambiguous. That criticism seems to be directed primarily at the words "essential functions"; it does not consider the specific delineation of those functions in my statement to the subcommittee and in my article in 109 U. of Pa. Law Review 157. Of course the words "essential functions" taken alone are ambiguous. But the specification of those functions, namely, to maintain the uniformity and supremacy of the Constitution, laws, and treaties of the United States, provides a workable standard for identifying the functions and their impairment. As indicated in my initial statement and in my article, as long as a significant avenue remains open for ultimate resolution by the Supreme Court of conflicts between state and federal laws or in the interpretation of federal law (including the Constitution), the Court's essential functions are not impaired. (A Supreme Court decision is not required in every case that involves such issues, and discretionary review through certiorari is as effective as mandatory review.)

(2) *Plain meaning and the spirit of the Constitution.*—It was suggested that the plain meaning of the exceptions and regulations clause allows impairment by Congress of the essential function of the Court to maintain the uniformity, if not the supremacy, of federal law, but that the actual exercise of such congressional power would violate the "spirit of the Constitution." The "spirit of the Constitution," i.e., the plan and the goals of the Constittion, however, is the essence of the Constitution. Language, and particularly constitutional language, is inherently ambiguous. The exceptions and regulations clause has no plain meaning. It must be interpreted in the context of the overriding constitutional plan, i.e., in the context of the spirit of the Constitution. Thus interpreted it does not confer upon Congress unlimited control over the Court's appellate jurisdiction. "The letter killeth but the spirit giveth life."

(3) *The absence of reference to the federal courts in the Supremacy Clause (Article VI).* The Clause, which mandates the uniformity of federal law and its supremacy over state law, manifestly requires judicial enforcement and contains an express admonition to the state judges. The federal courts are expressly given power to enforce the Clause by Article III which extends the judicial power of the United States to cases arising under the Constitution, laws, and treaties of the United

States and creates a single supreme federal tribunal with appellate jurisdiction over all such cases, whether initiated in federal or state courts, (subject to congressional exceptions and regulations).

(4) *For about a century federal criminal cases (tried in two-judge circuit courts) could not be appealed to the Supreme Court.*—During this period, however, avenues for Supreme Court review remained available in federal criminal cases to resolve conflicting interpretations of the federal constitution and laws: (a) where the circuit judges were divided, they were required to certify the disputed question to the Supreme Court (see Hart and Wechsler's, The Federal Court and the Federal System (2nd ed.) 37); (b) a habeas corpus corpus petition could be filed in the Supreme Court to test (i) constitutionality after conviction, (ii) probable cause for pre-trial commitment, which encompassed statutory, as well as constitutional, interpretation. (See Ratner, 109 U. of Pa. Law Review 196–201, and cases there cited.)

(5) *Marshall's position.*—It has been urged that John Marshall, in early decisions, acknowledged unlimited congressional control over the Court's appellate jurisdiction. A careful reading of *Ex parte Bollman* (8 U.S. 75), *U.S.* v. *More* (7 U.S. 159), and *Durousseau* v. *U.S.* (10 U.S. 307), however, indicates that Marshall's views were as follows: (a) Congress has broad discretion in legislation exceptions to the Court's jurisdiction; (b) if Congress does not exercise that discretion the Court retains its full constitutional jurisdiction; (c) if Congress exercises the discretion by specifying cases to which the jurisdiction extends, those cases not designated are impliedly excepted. Marshall did not state that the discretion is unlimited nor undertake to determine its constitutional limits. But 11 years later, in *Cohens* v. *Virginia* (19 U.S. 264) he declared:

"[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved * * * . [The framers of the Constitution] declare, that in such cases, the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction."

(6) *Support for the essential-functions test.*—It is asserted that the essential-functions limitation has no support in the cases, in the Federalist Papers, nor in any statement at the Constitutional Convention. In fact, the essential functions limitation is supported by cases, the Federalist Papers, and statements at the Convention.

(a) *Cases.* Marshall in *Cohens* v. *Virginia,* Story in *Martin* v. *Hunters Lessee,* and Taney in *Ableman* v. *Booth* all emphasize the essential function of the Supreme Court to maintain the uniformity and supremacy of federal law pursuant to the Supremacy Clause. They uphold the Court's jurisdiction to review, under section 25 of the first judiciary act, state court decisions involving the federal Constitution and laws only because that jurisdiction is authorized by the Constitution but also because it is required by the Constitution. (See quotes in my prior statement pp. 6–8 and in 109 U. of Pa. L. Rev. at 166–167.) In *Ex parte McCardle* the Court, after acknowledging that congress had withdrawn its jurisdiction to hear an appeal from a circuit court decision denying habeas corpus to the defendant, recognized the need to preserve its essential appellate functions by emphasizing that it still retained jurisdiction under the Judiciary Act of 1789 to review on a direct petition for habeas corpus the constitutionality of the circuit court's decision. (See prior statement p. 9 and 109 of U. of Pa. L. Rev. 178–180.) A few months later in *Ex parte Yerger* (75 U.S. 85) the Court affirmed its jurisdiction to review on direct petition for habeas corpus the constitutionality of a circuit court decision denying the writ, despite the congressional withdrawal of habeas corpus appeal, and strongly intimated that Congress lacked the power to impair its essential appellate functions by depriving it of all habeas corpus jurisdiction, stating (75 U.S. at 96–103):

"We agree that [the jurisdiction] * * * is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must * * * seriously hinder the establishment of that uniformity * * * which can only be attained through appellate jurisdiction * * *. These considerations forbid any construction giving to doubtful words [in the statute] the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less congent than they are."

There is broad language in some of the cases referring to unlimited congressional control over the Court's appellate jurisdiction, (see *Wiscart* v. *D'Auchy* (3 U.S. 321), *Barry* v. *Mercein* (46 U.S. 103), *The Francis Wright* (105 U.S. 381)), but the statements are generalized dicta. No case holds that Congress has the power to impair the Court's essential uniformity-supremacy functions because no case involved such an impairment except *Ex parte Yerger* which strongly rejected it.

(b) *The Constitutional Convention.*—Numerous statements at the Convention recognized the Supreme Court's appellate jurisdiction as constitutionally essential to maintain the uniformity and supremacy of federal law. In dicussing proposals to give the Supreme Court a veto over congressional and/or state legislation, proponents and opponents alike agreed that the Court would at least have ultimate authority to decide the constitutionality of state and federal legislation. In successfully opposing the constitutional establishment of inferior federal courts, Rutledge of South Carolina, a strong states-rights advocate, urged that "the state tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments." Madison, replying to the question of what redresses would be available if a state imposed prohibited export duties stated: "There will be the same security as in other cases—the jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States." And by defeating a motion that would have allowed the Supreme Court to exercise appellate jurisdiction "in such manner as the legislature shall direct," the Convention rejected a clear statement of plenary congressional power over that jurisdiction. (See Farrand, "Records of the Constitutional Convention" 79, 97, 109, 124; 2 Farrand, 76, 78, 425, 431, 589; 109 U. of Pa. L. Rev. 161–165, 172–173.)

(c) *The Federalist Papers.*—The writings of Madison and Hamilton in The Federalist provide further confirmation of the essential functions of the Court.

### MADISON (NO. 22)

"If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts * * *. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice."

### MADISON (NO. 39)

"It is true that in controversies relating to the boundary between the two jurisdictions [nation and state], the tribunal which is ultimately to decide is to be established under the general government * * *. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact."

### HAMILTON (NO. 80)

"If there are such things as political axioms, the propriety of the judicial power of the government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

### HAMILTON (NO. 81)

"That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested."

### HAMILTON (NO. 82)

"[T]he national and state systems are to be regarded as one whole. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union and an appeal from them will as naturally lie to that tribunal [the Supreme Court of the United States] which is destined to unite and assimilate the principles of national justice and the rules of national decision."

Sincerely,

LEONARD G. RATNER,
*Legion Lex Professor of Law.*

SCHOOL OF LAW, DUKE UNIVERSITY,
*Durham, N.C., June 15, 1981.*

SENATOR ORRIN G. HATCH,
*Chairman, Constitution Subcommittee,*
*U.S. Senate, Washington, D.C.*

DEAR SENATOR HATCH: Your recent letter to me of June 5, 1981, was most welcome. I was pleased to participate in the hearings regarding the power of Congress in respect to the appellate jurisdiction of the Supreme Court, and I have already returned a corrected transcript which was itself sent to me very promptly.

Your letter refers to questions submitted by Senator Leahy as being "enclosed", but (presumably by accident) the only sheet enclosed with your letter did not contain any such questions, and I am therefore unable to be of help pending some further information.

Since the hearings in which I appeared, however, I did receive a supplemental statement by Professor Leonard Ratner which he submitted after I sent him a copy of my prepared testimony. His supplemental statement purports to find fault with my own position, insisting (contrary to my own research) that numerous early quotations exist in support of the view that the "exceptions" clause in Article III was understood to be subject to some kind of "essential functions" limitation. I had in fact seen all of those quotations before. None of them is in explication of the "exceptions" clause. Each, rather, is merely in the different context of offering supportive argument as to why it was desirable to frame Article III as it was framed, i.e., to include within "the judicial power of the United States" the kinds of cases that that power would ordinarily extend to (once the Article was ratified), insofar as many did indeed regard the vesting of such judicial power as essential. Of course, that it was deemed "essential" that the judicial power of the United States should be established to reach these various categories of important cases is interesting and informative. But it is utterly inconclusive of the separate question the Committee was immediately addressing, namely, to what exent may Congress decide from time to time the scope of exceptions to be made, pursuant to its own power provided in the exceptions clause, in respect to that jurisdiction, reposing finality of adjudication in either state courts or in specialized national courts? Respectfully, nothing in Professor Ratner's original (or supplemental) testimony causes me to propose any change in all in the testimony I provided the Committee on that question.

Sincerely,

WILLIAM VAN ALSTYNE.

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THE LAW CENTER,
UNIVERSITY OF SOUTHERN CALIFORNIA,
*Los Angeles, June 30, 1981.*

Senator ORRIN G. HATCH,
*Chairman, Subcommittee on the Constitution,*
*Washington, D.C.*

DEAR SENATOR HATCH: Thank you for your letter of June 5th concerning my testimony before the Senate Constitution Subcommittee. The questions from Professor Van Alstyne's statement put by Senator Leahy have been substantially answered by me in my statement, supplemental statement, and testimony. By way of summary my responses to the questions are as follows:

(1) The alternative interpretations of the Exceptions and Regulations Clause are: (a) the Clause gives Congress unlimited control over the Supreme Court's jurisdiction; (b) the Clause permits exceptions and regulations not inconsistent with the essential functions of the Court, established by Article III and Article VI, to maintain the uniformity and supremacy of the Constitution, laws and treaties of the United States.

(2) Given the ambiguity of "exception and regulations" perhaps no interpretation is "quite clear", but Articles III and VI, along with the Supreme Court decisions in *Cohens* v. *Virginia*, *Martin* v. *Hunter's Lessee*, *Ableman* v. *Booth*, and *In re Yerger*, statements at the Constitutional Convention, and the writings of Madison and Hamilton in The Federalist Papers strongly indicate that Congress may not deprive the Court of its essential constitutional jurisdiction to ultimately maintain the uniformity and supremacy of federal law.

(3) The exceptions and regulations power of Congress, like all powers of Congress, is subject to the limitations imposed by the Bill of Rights, and in particular to the requirement of equal protection implicit in the due process clause. Justification for

the apparent discrimination resulting from withdrawal of Supreme Court jurisdiction to review the constitutionality of certain kinds of laws, but not of other kinds, would, however, turn on whether the Exceptions and Regulations Clause authorizes Congress to check the continued application of congressionally-disapproved constitutional decisions by cutting off the Court's essential jurisdiction to maintain the uniformity and supremacy of federal law, including the Constitution.

(4) In determining the wisdom and practicality of limiting the Supreme Court's appellate jurisdiction, Congress should consider the essential constitutional function of the Court to maintain the uniformity and supremacy of federal laws, including the Constitution, and the gross distortion in the federal system that would result from reducing the supreme law of the land to a hodgepodge of inconsistent final decisions by fifty state supreme courts and eleven federal courts of appeal.

Sincerely,

LEONARD G. RATNER,
*Legion Lex Professor of Law.*

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SCHOOL OF LAW, WASHINGTON UNIVERSITY,
*St. Louis, July 1, 1981.*

Attention: RANDALL R. RADER,
*Subcommittee on the Constitution,*
*U.S. Senate, Washington, D.C.*

DEAR RANDY: Enclosed are three copies of my supplemental statement, replying to the comments of Mr. Cutler, which we discussed after the hearing last week. I trust it will find its way into the printed record.

I enjoyed the hearing and was flattered by Senator Hatch's attention. I look forward to seeing you again soon.

Sincerely,

JULES B. GERARD,
*Professor of Law.*

Enclosures.

## SUPPLEMENTAL STATEMENT OF JULES B. GERARD

I submit this supplemental statement to the Subcommittee to respond to two comments by Mr. Cutler of the American Bar Association about my testimony of June 22, 1981.

It should be no surprise that the American Bar Association, an organization of lawyers (myself included), opposes any effort to restrict the power of courts. It is a matter of self-interest, pure and simple. The more power courts have to make social policy without regard to the democratic legislative process, the more power lawyers have to influence the making of that social policy directly.[1] Moreover, all judges are lawyers and many lawyers aspire to the bench, which gives them an additional reason to oppose measures that reduce the power of the judiciary. The fact of that self-interest should not be ignored when Congress is deciding how much weight to accord the testimony of the organized bar.

First, Mr. Cutler disputes my contention that Congress may withdraw cases challenging the constitutionality of state practices from the jurisdiction of the federal courts. His argument is that the Supremacy Clause of the Constitution mandates that such cases be heard by the Supreme Court. Yet the overwhelming majority of the Supreme Court's business is discretionary.[2] And the American Bar Association supports legislation that would enlarge even further the Court's discretion is selecting cases for review.[3] By what logic can the Supremacy Clause require Congress to permit Supreme Court review of challenges to state laws, while at the same time permitting the Court itself to refuse to hear those cases? If Judicial review of state practices is mandatory, surely it must be mandatory for the Court as well as for Congress.

Moreover, Congress long ago closely approximated Mr. Cutler's position by granting appeals as of right from decisions upholding state laws against claims of constitutional privilege.[4] But the Court has persistently ignored not only what Mr. Cutler regards as a constitutional imperative, but the clear command of the statute as well.[5] There has been little pretense about this: almost thirty years ago Chief Justice Warren bluntly told the American Law Institute that "it is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari."[6]

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[1] For a study of how lawyers influenced social policy in a previous era of judicial hegemony, see B. Twiss, Lawyers and the Constitution (1942).

[2] See generally, R. Stern and E. Gressman, Supreme Court Practice 36–51 (5th ed. 1978).

[3] "Congresscan," 67 A.B.A.J. 704 (1981).

[4] 28 U.S.C. 1257 (2) (1976).

*Naim* v. *Naim*[7] is perhaps the most notorious example of Supreme Court disregard of a mandatory appeal. In that case, which arose after *Brown* v. *Board of Education*,[8] the Court refused to review a Virginia decision upholding that state's anti-miscegenation law against a constitutional challenge. The reasons the Court gave for refusing review were, in the judgment of Professor Herbert Wechsler, "wholly without basis in the law."[9] In addition to *Naim* and other cases disposed of on questionable procedural gounds,[10] there have been literally thousands of summary dispositions of mandatory appeals on the basis of the jurisdictional statement alone. In those thousands of cases, the appeal, which Congress attempted to make obligatory, and which, according to Mr. Cutler, the Constitution itself required, amounted to nothing more than a pro forma approval of the preceding decision. The so-called "appeal" "not only does not include a right to be heard orally but does not even include a right to have the case considered upon plenary briefs."[11]

How the Court's behavior can be squared with Mr. Cutler's interpretation of the Supremacy Clause is a mystery. Either Mr. Cutler's reading of the Supremacy Clause is mistaken, or the Supreme Court itself is a persistent violator of the Constitution.

Second, Mr. Cutler argued that, as a matter of constitutional law, interpretations of the Constitution must be uniform throughout the country, and, therefore, the Supreme Court must be given authority to resolve conflicts among the lower federal courts and the several state courts. But the Court's own rules do not require it to review conflicting decisions.[12] The plain truth is that the Court has permitted such conflicting decisions to stand, with the result that federal constitutional rights have varied among the states.

Cases involving the regulation of hair length by school officials are one example. These regulations were regularly challenged as violations of the constitutional rights of expression, of privacy, and of other species of substantive due process. A large body of case law developed in both the state and federal courts. By 1972, when the Supreme Court denied certiorari in *Freeman* v. *Flake*,[13] eight circuits had considered such cases: four had upheld the regulations[14] while four had overturned them.[15] Justice Douglas, dissenting from the denial of certiorari in another hair length case, complained, "The federal courts are in conflict and the decisions in disarray. We have denied certiorari where the lower court has sustained the school board and also where it has overruled them."[16] Despite the "deep and irreconcilable"[17] conflict over a recurrent issue, the Court maintained a Sphinx-like silence. In fact, the Supreme Court has not to this day given plenary consideration to a school hair length case.[18]

This behavior is difficult, if not impossible, to reconcile with Mr. Cutler's view that uniform interpretations of the Constitution are constitutionally mandated. As I made clear in my earlier statement, I agree that there is an important value in interpretations of the Constitution that are uniform throughout the land. But uniformity is only a value, not a constitutional command.

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[5] See Gunther, The Subtle Vices of the "Passive Virtues" A comment on Principle and Expediency in Judicial Review, 64 Columbia L. Rev. 1 (1964; Note, The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts, 63 Columbia L. Rev. 688 (1963).

[6] Quoted in Wiener, The Supreme Court's New Rules, 68 Harvard L. Rev. 20, 51 (1954).

[7] 350 U.S. 985 (1956).

[8] 347 U.S. 483 (1954).

[9] Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harvard L. Rev. 1, 34 (1959).

[10] E.g., *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549 (1947); *Poe* v. *Ullman*, 367 U.S. 497 (1961).

[11] Hart, Foreword: The Time Chart of the Justices, 73 Harvard L. Rev. 84, 89 n. 13 (1959).

[12] Supreme Court Rule 17.1 states that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Subsections (a) and (b) of the rule list conflicts between two federal courts of appeals, between a federal court of appeals and a state court of last resort, and between two state courts of last resort, as situations which may result in the grant of certiorari.

[13] 405 U.S. 1032 (1972).

[14] *Freeman* v. *Flake*, 448 F.2d 258 (10th Cir. 1971); *King* v. *Saddleback Junior College*, 445 F.2d 932 (9th Cir. 1971); *Jackson* v. *Dorrier*, 424 F.2d 213 (6th Cir. 1970); *Ferrell* v. *Dallas Ind. School District*, 392 F.2d 697 (5th Cir. 1968).

[15] *Massie* v. *Henry*, 455 F.2d 779 (4th Cir. 1972); *Bishop* v. *Colow*, 450 F.2d 1069 (8th Cir. 1971); *Richards* v. *Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969).

[16] *Olff* v. *East Side Union High School District*, 404 U.S. 1042, 1045–46 (1972).

[17] Id. at 1046 n.5.

[18] The Court did subsequently uphold a police department hair length rule. *Kelley* v. *Johnson*, 425 U.S. 238 (1976).

Society of American Law Teachers,
*Santa Clara, Calif., June 19, 1981.*

Hon. Orrin G. Hatch,
*Senator from Utah, Chairman, Constitution Subcommittee, U.S. Senate, Committee on the Judiciary, Washington, D.C.*

My Dear Senator Hatch: Your letter of June 5 arrived as I am about to depart for teaching obligations in the far East. Unfortunately, it is difficult for me to comment on the rather broad questions raised by Bill Van Alstyne in the remaining time.

In any event, my main purpose was to urge that it is clearly not within the power of Congress to use the Exceptions Clause as a means of overruling prior decisions of the Supreme Court of the United States. Since Marbury v. Madison it has been well established that the Supreme Court is the final arbiter of constitutional meaning and that Congress is bound by its interpretations and bound to follow Supreme Court decisions. Subject only to constitutional amendment or a new decision of that Court it is not within the power of Congress to use the Exceptions Clause as a means of circumventing that limitation otherwise the Supreme Court's role becomes illusory.

A great deal of the discussion concerning use of the Exceptions Clause and, for that matter, limiting the jurisdiction of lower federal courts, centers around efforts openly to affect constitutional adjudication. That, I have urged, violates the Congressional obligation to follow the mandates of the constitution.

If on my return in mid-July you would give me the opportunity to comment on Professor Van Alstyne's testimony, I will be happy to do so. I would, of course, require a copy of his statement.

Again, my thanks for your attention to this Society's concerns.

Sincerely,

George J. Alexander.

## Supplemental Statement of Dr. Hermine Herta Meyer

### THE POWER OF CONGRESS OVER THE JURISDICTION OF THE FEDERAL COURTS

When the proposed Constitution of the United States was submitted to the thirteen original States for ratification, there were objections that the powers of the central government were too wide, and that the federal judicial department would be oppressive. In particular, it was feared that the Supreme Court might misuse its power to construe the laws "to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body."

In Nos. 80 and 81 of the Federalist Papers, Alexander Hamilton assured the States that, while Congress could not alter a determination once made in a particular case, it may prescribe a new rule for future cases. But if "some partial inconveniences" should appear, "the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove such inconveniences." And in No. 51 of the Federalist Papers, James Madison had pointed out, "In republican government, the legislative authority necessarily predominates."

The reason therefor is that the Constitution of the United States is based on the principles of self-government of the people, and that the members of Congress are their elected representatives and therefore responsible to them.

Accordingly, the Constitution has placed all important powers into the hands of the elected representatives of the people.

Article I of the Constitution has vested all federal legislative power in the Congress. No legislative power whatsoever has been given to the federal courts. The Constitution has given them only the power to decide certain cases and controversies, and their decisions were intended to be binding only on the parties to the controversy. (See Madison's notes in 2 Farrand, the Records of the Federal Convention of 1787, p. 430; and 2 George Bankcroft, History of the Formation of the Constitution of the United States of America 198 (New York 1882)). In 1842, Justice Story still correctly recognized that court decisions do not constitute laws. *Swift* v. *Tyson,* 41 U.S. (16 Pet.) 1, 18.

Article III of the Constitution has given Congress wide powers over the jurisdiction of the federal courts. Only the few cases in which the Supreme Court has original jurisdiction are fixed by the Constitution itself. All other federal jurisdiction depends on congressional legislation.

Section 1 of Article III gives Congress the power to establish and abolish inferior federal courts. It has invariably been recognized that this power gives Congress complete authority over the entire jurisdiction of the lower federal courts.

Section 2, clause 1, of Article III, describes the judicial power granted by the Constitution to the federal courts. It extends to all cases arising under this Constitution, that is the Constitution as written and intended by the framers and as legally amended, the acts of Congress, and the treaties made under the authority of the United States; and to controversies between certain named parties.

Section 2, clause 2 of Article III, enumerates the few cases in which the Supreme Court has original jurisdiction, and then provides:

"In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Some commentators have argued that the "exceptions clause" does not include cases that have a constitutional dimension, disregarding completely the unrestricted power of Congress to prescribe regulations.

The unrestricted nature of that power was already pointed out by Hamilton in No. 80 of the Federalist Papers, supra. It received even clearer confirmation by a man whose authority cannot be questioned, namely Oliver Ellsworth. He was a member of the Federal Convention of 1787 which drafted the Constitution, and of the Committee of Detail where the clause providing for the Supreme Court's appellate jurisdiction was formulated. He also served in the United States Senate from 1789-1796 and was the chief author of the first act of Congress regulating the jurisdiction of the federal courts, namely the Judiciary Act of 1789. In 1796 he became Chief Justice of the United States. The first case in which the meaning of the appellate jurisdiction of the Supreme Court was in issue was *Wiscart* v. *Dauchy*, 3 U.S. (3 Dall.) 321 (1796). There, Chief Justice Ellsworth said:

"Here then, is the ground and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?" (Id. at 327).

Probably because of such authoritative sources of the meaning of the Supreme Court's appellate jurisdiction clause, the Supreme Court has never questioned the plenary power of Congress over its appellate jurisdiction, not even Chief Justice Warren who said in *Carroll* v. *United States*, 354 U.S. 394, 399 (1957), that the existence of appellate jurisdiction in a specific federal court "is dependent upon authority expressly conferred by statute."

Congress has made regular use of its power to control the jurisdiction of the federal courts, not only by affirmative regulations, but also by taking away jurisdiction which the federal courts had previously exercised. One such example is the *McCardle* case where Congress divested the Supreme Court of its appellate jurisdiction after it had already taken jurisdiction. 74 U.S. (7 Wall.) 506, 513-514 (1869). Another example is the Norris-LaGuardia Act of March 23, 1932, which, with certain exceptions, took from the federal courts their power to issue injunctions in a case involving labor disputes. This too was recognized by the Supreme Court as a valid exercise of congressional power over the jurisdiction of the federal courts. *Milk Wagon Drivers Union* v. *Lake Valley Farm Products*, 311 U.S. 91, 103 (1940).

Most recently, the Supreme Court itself has asked Congress to take away its mandatory appellate jurisdiction and permit it to retain only discretionary jurisdiction on write of certiorari. The Senate responded with a bill, S. 450—96th Congress, which passed the Senate but not the House. Had it passed, no litigant, not even a State, would have had a right to obtain a decision of the highest court. In the letter of June 22, 1978, with which the Supreme Court requested such legislation (printed as Appendix 1 to Senate Report No. 96-35), the Supreme Court did not indicate with one word that the power of Congress over its appellate jurisdiction was in any way restricted. If the Supreme Court did not believe that Congress had full power over its appellate jurisdiction because there is a constitutional right to appeal, it could never have asked Congress to relieve it of all cases providing for a right to appeal to the Supreme Court.

There is no doubt that the Constitution has given Congress unrestricted power over the jurisdiction of the lower federal courts and over the appellate jurisdiction of the Supreme Court.

DAVID & FINELL,
*New York, N.Y., October 22, 1981.*

Hon. RANDY RAIDER,
*Washington, D.C.*

DEAR RANDY: I enclose a typescript of the Association of the Bar of the City of New York Committee on Federal Legislation's report on the power of Congress to restrict Supreme Court and lower federal court jurisdiction to hear constitutional claims. The typescript has just been sent to the printer and I will send you printed copies of the report as soon as they are available.

As we have discussed before, our Committee would appreciate an opportunity to present its views in testimony if further hearings are held. We would also appreicate your considering inclusion of our report in your Committee's record on the pending bills.

Sincerely yours,

STEVEN FINELL.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
*42 West 44th Street*
*New York, New York 10036*

# Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review

*By* THE COMMITTEE ON FEDERAL LEGISLATION*

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* Preprinted from THE RECORD of the Association for December 1981. Copies of this Report have been mailed to Congress.

## *INTRODUCTION*

Central to our system of government, and to its success, is the principle of separation of powers and the elaborate system of checks and balances that prevents any organ of government from exceeding its authority or infringing the rights of the people. The federal judiciary has long played a central role in that scheme by exercising the power of judicial constitutional review—by which we mean judicial determinations, in cases properly brought by parties having standing, of whether actions by the political branches of the federal government or by the states conform with or contravene our supreme law, the United States Constitution. It is principally through the mechanism of judicial constitutional review that the Constitution's limitations on the political branches of government are enforced. Alexis de Tocqueville observed:

> "I am inclined to believe this practice of the American courts to be at once the most favorable to liberty and to public order . . . . [T]he power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies."[1]

The "barrier against tyranny" praised by de Tocqueville nearly two centuries ago is today under attack by newly powerful forces in Congress. There are pending in both houses of Congress at least 25 bills that, if enacted and upheld as constitutional, would have the effect of scrapping the federal courts' historical role in the system of checks and balances. These bills, listed in the Appendix to this Report, would divest the federal courts of all original and appellate jurisdiction to hear cases relating to (1) the constitutionality of programs of "voluntary" prayer in the public schools or other public places, (2) the constitutionality of laws or regulations affecting abortions, (3) busing as a remedy for school segregation, and (4) the constitutionality of treating men and women differently in connection with the armed forces or the draft. One bill, H.R. 114, may be read to go even further—to eliminate all federal judicial review of state court decisions.

In this Report, we do not address the merits of the various federal court decisions on these subjects that have prompted the proposed legislation, nor do we analyze the individual bills in detail. Rather, we address a question that is raised by all such proposals: Is the elimination of federal court jurisdiction to hear constitutional claims a lawful and appropriate response to judicial decisions of which a current majority in Congress disapproves? That question is fundamental to the structure of our government because, if Congress can legitimately curtail the federal courts' jurisdiction to hear constitutional claims concerning such specific issues as school prayer, abortion, and desegregation, then there is no principled limitation on Congress' power effectively to eliminate the judicial branch as a check on the other branches of the federal government or the states. By enacting any of the present bills, Congress would necessarily be claiming the power, should it so choose, to forbid the federal courts to hear *any* claim asserted under the Bill of Rights or under any other provision of the Constitution.

Although most of the proponents of these bills generally style themselves as "conservatives," our review of the historical record reveals that their proposals are *radical* in the most extreme sense of that word. They would not only cast doubt upon the abortion, school prayer, and busing decisions of the past few years, but two centuries of historical development and constitutional doctrine. For the reasons set forth below, we conclude that this radical departure from the system of checks and balances that has served our nation well for the past two centuries is unwise and probably unconstitutional. There is no precedent of enacted legislation eliminating all federal court jurisdiction to hear claims of deprivation of constitutional rights. To find any precedent for the present bills, one must look to many bills that have been proposed over the years but *not* enacted.[2] Congress wisely declined these previous invitations to tamper with our constitutional structure of government, and should decline the same invitation presented by the current bills.

Article III of the Constitution does grant Congress power to regulate the jurisdiction of the federal courts (see Part III below). But, as the following analysis shows, this power cannot fairly be construed to permit Congress to deprive the courts of jurisdiction to hear claims arising under the Constitution itself, particularly on an issue-by-issue basis. If Congress' power were so extensive, it would undo the elaborate system of checks and balances that the Framers of the Constitution so carefully crafted. First, it would upset the checks and balances among the three coordinate branches of the federal government, eliminating the judiciary as a check upon unconstitutional actions of the political branches by the simple expedient of removing their jurisdiction to consider challenges to such actions. Second, it would disrupt the allocation of power between the federal government and the states, by eliminating the power of the federal judiciary to restrain acts of the states that violate the Constitution. Third, and perhaps most significant, it would alter the constitutional balance between individual rights and majority will, since the judiciary is the only organ of government that is institutionally suited to protect the rights that our Constitution guarantees to individuals against the wishes of a strong-willed majority.

Another serious objection to legislation of the sort currently proposed is that it is undesirable to deal with complex and controversial social issues, particularly those of constitutional dimension, by eliminating the opportunity for full airing and debate in the federal judiciary. Indeed, one of the ironies of the present bills is that the constitutional interpretations with which the bills' sponsors differ would remain frozen as the supreme law of the land forever, binding upon the state courts under the Supremacy Clause[3] and the doctrine of *stare decisis*, without any possibility of change through the evolution of legal thought or a change in judicial (particularly Supreme Court) personnel.

We are not alone in voicing our alarm over the present jurisdiction-stripping proposals. In August 1981, the American Bar Association announced its strong opposition to the jurisdiction-stripping device.[4] The New York State Bar Association has issued a report that reaches the same conclusion. The substantial majority of legal scholars and former senior Government lawyers who have testified before committees of Congress—from both sides of the political spectrum—have explained their opposition to the jurisdiction-stripping proposals.[5] And a distinguished jurist, Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit, has written that the jurisdiction-stripping device

> "threatens not only a number of individual liberties, but also the very independence of the Federal courts, an independence that has safeguarded the rights of American citizens for nearly 200 years."[6]

* * *

We begin this Report with a brief description of the pending bills (Part I). We then examine in detail the role of the federal judiciary in our governmental structure (Part II) and the extent of Congress' control over federal court jurisdiction under Article III of the Constitution (Part III).

## I. *PENDING BILLS TO RESTRICT FEDERAL COURT JURISDICTION OVER CONSTITUTIONAL CLAIMS*

As noted, at least 25 bills are pending in both houses of Congress that would restrict the powers exercised by federal courts in cases involving constitutional questions. While these bills to a large extent invoke the same claims to congressional power over federal court jurisdiction, the nature of the constitutional interests affected by them, and the scope of the restrictions proposed, vary substantially. The bills of which we are aware (listed in the Appendix) fall into five categories: prayer, abortion, school desegregation, sex-based military classifications, and federal court review of state court decisions.

### A. *Prayer*

"Voluntary prayer in public schools and public buildings" is the subject of seven virtually identical bills in the House[7] and one bill in the Senate.[8] These bills are a response to court decisions holding that certain religious observances in public schools, whether voluntary or involuntary, violate the First Amendment's prohibition against laws establishing religion.[9] Modeled on the so-called Helms amendment introduced in the 96th Congress,[10] such bills would divest the Supreme Court and the lower federal courts of jurisdiction to hear any case that relates to "voluntary prayer" and that arises out of either "any State statute, ordinance, rule, regulation, or any part thereof" or out of any act of Congress "interpreting, applying, or enforcing" such state acts. Actions currently pending in the federal courts would not be affected by these proposals.[11]

Since each of these proposed bills applies only to the jurisdiction of the federal courts, challenges to the constitutionality of state acts relating to voluntary prayer could still be brought in state courts. State courts, like the federal courts, are bound to give full effect to the provisions of the Federal Constitution and to recognize its supremacy over state laws and regulations.[12] In addition, since the proposed legislation does not and could not purport to alter any prior federal court decisions on the subject of prayer in public schools and public buildings, state courts would still be obligated to apply existing Supreme Court precedent in ruling on future cases.

One of the pending bills would eliminate the Supreme Court's appellate jurisdiction in any case involving a state act that relates to voluntary prayer in public schools or buildings, or that relates to "the qualifications imposed by the State as a condition of teaching in the public schools of the State."[13] The latter provision would eliminate all federal appellate jurisdiction where a state law unconstitutionally imposed racial, religious, political, or other invidious qualifications for schoolteachers.

### B. *Abortion*

The Supreme Court has held that certain types of laws restricting or regulating therapeutic abortions infringe women's constitutionally guaranteed right of privacy.[14] Four bills pending in the House and two in the Senate would restrict the federal courts' power to enforce these constitutional rights.

Two identical bills, H.R. 73 and S. 583, would simply forbid lower federal courts to enjoin the operation of federal or state laws that restrict abortion, pending final review by the Supreme Court.[15] In the event that the Supreme Court does not review a lower court's ruling in an abortion case, the bills would foreclose any injunctive relief. These bills would not affect the Supreme Court's appellate jurisdiction, nor would they foreclose the lower federal courts from ruling on the constitutionality of state or federal laws relating to abortion. However, by prohibiting the lower federal courts from enjoining the operation of federal or state abortion laws, the bills would in most cases remove the only effective means to enforce such rulings. It would be extremely difficult to maneuver a case through a district court, a court of appeals, and then the Supreme Court quickly enough for an abortion to be safely performed at the end of the judicial process; requiring abortion cases to be handled so hastily would place an intolerable burden on the courts.

Three other bills[16] would also divest the lower federal courts of jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in cases involving state or local laws prohibiting or regulating abortion, but would go further, in seeking to undo the Supreme Court's decisions on abortion by declaring that, for constitutional purposes, human life begins at conception. These bills, although not fully impairing the Supreme Court's appellate jurisdiction, also go further than H.R. 73 in proscribing declaratory as well as injunctive relief and in proscribing declaratory or injunctive relief even after review by the Supreme Court.

Although these bills purport to be a limitation on federal court jurisdiction, they actually represent a restriction not on the types of cases the federal courts may hear, but on the relief those courts may grant. The bills thus raise questions as to the extent of Congress' power to restrict the traditional remedies dispensed by duly constituted courts in cases over which they have jurisdiction—questions that are outside the scope of this Report.[17]

H.R. 867 more closely resembles the pending prayer bills. That bill would remove the jurisdiction of both the Supreme Court and the lower federal courts in cases arising out of either any "State statute, ordinance, rule, regulation or any part thereof" which relates to abortion, or any "Act interpreting, applying, or enforcing" any such state act.

### C. *School Desegregation*

The Supreme Court has held that in certain circumstances, where public schools have been racially segregated in violation of the Fourteenth Amendment's Equal Protection Clause and where no other remedy will effectively eliminate the pattern of segregation, the Constitution *requires* that pupils be assigned and transported to schools in a manner that eliminates the unconstitutional pattern of racial segregation.[18] The only limitation upon this constitutional mandate is that "the time or distance of travel" not be "so great as to either risk the health of the children or significantly impinge on the educational process."[19] Six bills proposed in the House and one in the Senate would restrict the federal courts' jurisdiction to award this remedy even where constitutionally required.[20] Although phrased in terms of a limitation on federal court jurisdiction, these bills really limit the power of federal courts to award a particular remedy, not the power of federal courts to hear cases involving certain types of disputes.

H.R. 761 is much broader than the other bills, in that it is not confined to desegregation orders that require busing. Read literally, this bill would forbid any federal court remedy for school segregation, since any desegregation order—even one that did not employ busing—would require that individual students be assigned to a "particular school," even if the assigned school were the one nearest his home.

H.R. 869, which parallels the prayer bills in form, would deny to the federal courts jurisdiction to hear "any case arising out of" any state act (or any act interpreting, applying, or enforcing a state act) "which relates to assigning or requiring any public school student to attend a particular school because of his race, creed, color, or sex." While the intent of the draftsman was probably to eliminate federal court jurisdiction to assign students to schools on the basis of race, if the bill is read literally it would eliminate all federal court original and appellate jurisdiction to hear *any* segregation case, since even a state statute that blatantly assigned all black students to one school and all whites to another would be a "State statute . . . assigning . . . any . . . student to attend a particular school because of his race" and therefore beyond federal judicial purview under this bill.

Two other bills, H.R. 2047 and S. 528, would not prohibit the federal courts from employing busing as a remedy for school segregation. Rather, these bills would limit the circumstances in which busing may be ordered, limit the length of the bus ride, and require that alternative remedies be explored before ordering busing as a last resort.

### D. *Armed Forces*

H.R. 2365 would eliminate Supreme Court and lower federal court jurisdiction to review equal protection challenges to males-only registration or induction for military service—a constitutional claim rejected by the Supreme Court after the bill was introduced.[21]

Of more concern, therefore, is H.R. 2791, which would deprive the Supreme Court and lower federal courts of jurisdiction to hear constitutional challenges not only to different treatment of the sexes in registration for the draft or induction, but also to sex-based standards for the composition of, or duty assignments in, the armed forces. While courts have generally given the military wide latitude in determining whether sex-based distinctions are appropriate, some sex-based classifications in the military, apart from the draft, have been ruled unconstitutional.[22]

These two bills raise serious constitutional problems beyond those presented by the bills previously discussed, since they foreclose federal court challenges to federal laws and regulations. The other bills primarily address federal judicial review of state acts, and at least leave the state courts as forums for judicial constitutional review. These two bills, however, might eliminate *any* avenue of judicial constitutional review, since state courts may be powerless to afford a remedy for unconstitutional actions by federal officials.[23]

### E. *Review of State Court Decisions*

H.R. 114 would deny to any court "that is established by Act of Congress under Article III of the Constitution . . . jurisdiction to modify, directly or indirectly, any order of a court of a State if such order is, will be, or was, subject to review by the highest court of such State."

It is not clear whether this bill would affect the Supreme Court's jurisdiction, since the Supreme Court was created directly by Article III of the Constitution, but is organized by congressional act, or whether it refers only to the inferior federal courts. If the bill is intended to apply to the Supreme Court, it would entirely eliminate the Supreme Court's appellate jurisdiction over all state court decisions—constituting a radical curtailment of the Supreme Court's constitutional role (see Part IIB below). If, on the other hand, H.R. 114 is intended to affect only the jurisdiction of the lower federal courts, it is likely to have little impact, since the lower federal courts do not have appellate jurisdiction over state court decisions, and therefore ordinarily have no occasion to modify state court orders (except perhaps indirectly, as in habeas corpus cases).

* * *

Having briefly described what the 25 pending bills seek to do, we turn now to our analysis of the wisdom and constitutionality of the basic concept underlying them all. We consider first whether such legislation would profoundly alter the system of checks and balances upon which our constitutional government rests. We then discuss whether, in any event, Congress has the power under the Constitution to enact such laws.

## II. *THE CONSTITUTIONAL ROLE OF THE FEDERAL JUDICIARY*

Such power as Congress has over federal court jurisdiction derives from two brief phrases in Article III of the Constitution. One of them, following a statement that the Supreme Court shall have appellate jurisdiction, both as to law and fact, in all cases within the broadly defined "judicial power of the United States," adds, "with such Exceptions, and under such Regulations as the Congress shall make" (Art. III, § 2). The other, providing that the judicial power of the United States shall be vested in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish" (Art. III, § 1), is the source of Congress' power over lower court jurisdiction.

To interpret these provisions, it is necessary to examine them in the context of the role of the judicial branch of the federal government in our constitutional system. Central to that system is the principle of separation of powers among the branches of the federal government as it relates to judicial constitutional review. Within that system, judicial constitutional review by the federal judiciary serves four distinct, yet interrelated, functions: (a) the federal judiciary enforces the Constitution's limitations on the power of the political branches of the federal government; (b) the federal judiciary assures the supremacy of the United States Constitution and laws vis-a-vis the states; (c) the federal judiciary protects individual rights guaranteed by the Constitution against encroachments by majority will as expressed in acts of the federal and state governments; and (d) the federal judiciary accommodates the principles of our written Constitution with the changing needs of society. We shall examine in turn each of these aspects of the federal judiciary's role and show why the proposed legislation would undermine them all.

### A. *Judicial Review and the Separation of Powers*

The first three articles of the Constitution set forth the specific, limited powers granted to the three coordinate branches of the federal government: the legislature, the executive, and the judiciary. The Framers conceived of this separation of powers as the essential safeguard of the liberties of American people. Thus, in *The Federalist Papers*, Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."[24] The doctrine of separation of powers does not require that the legislative, executive, and judicial departments be wholly unconnected with each other, but rather that they should be "so far connected and blended as to give to each a constitutional control over the other."[25] The Supreme Court has repeatedly reaffirmed these concepts as basic to our federal governmental structure.[26]

The Founding Fathers feared tyranny by a majority of the public and therefore feared tyranny by a legislature elected by that majority. Judicial constitutional review by an independent federal judiciary not beholden to the public or legislature for tenure in office or continued compensation[27] was intended by the Framers as the people's safeguard against the exercise of governmental power in excess of that conferred under the Constitution and against the invasion of the individual's rights of liberty and property.[28]

In our jurisprudence, the federal judiciary can only exercise this essential power of judicial constitutional review by declaring and applying the law in cases and controversies submitted to the courts for decision. That fundamental concept led, in 1803, to the Supreme Court's unanimous decision in *Marbury v. Madison*,[29] and Chief Justice Marshall's heretofore unchallenged declaration that: "It is emphatically the province and duty of the judicial department to say what the law is."[30] More than 150 years later, another unanimous Supreme Court, in the Little Rock school desegregation case, said of *Marbury v. Madison*:

> "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional sytstem."[31]

The function of constitutional review is allocated to an independent judiciary in order to prevent the accumulation of power in one department of the government. As Hamilton wrote in *The Federalist Papers*, it could not be expected "that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges."[32] Thus, a constitutional system that imposes limitations on the authority of the legislative branch also requires an independent branch to determine whether legislation comports with the constitutional limitations; otherwise, the legislature would have the power both to enact and to judge the law, and there would be no check on its proper exercise of its powers.[33]

Judicial constitutional review does not imply judicial supremacy, but rather rests on the foundation of legislative supremacy. As Hamilton explained, because the adoption of the Constitution expressed the people's ultimate legislative act of ratification, the courts are *obliged* to invalidate legislation that is contrary to the Constitution.[34] The function of constitutional review is safely entrusted to the judiciary not because it is the supreme branch of government, but rather because it is the weakest. As Hamilton observed, "The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated."[35] In contrast, the judiciary "may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[36]

The power of judicial constitutional review is not absolute, but is limited by the very nature of the judicial function. Courts may decide constitutional questions only when those questions must be answered to decide justiciable cases submitted to them by litigants with standing to raise such questions.[37] Hence, the judiciary does not sit in general review of legislation as it is enacted or executive actions as they are taken. Nor have the courts any power to review legislation or executive actions on their own initiative. Rather, judges must wait for the necessity of constitutional review to be thrust upon them by litigants whose interests are adversely affected by conduct claimed to be unconstitutional.[38] This limitation is expressed in Article III's definition of the judicial power as extending only to "cases" and "controversies."[39]

The Founding Fathers were not unmindful of the possibility that the judiciary, like the other two branches of government, might be tempted to exceed its constitutionally circumscribed role. Hamilton conceded the possibility that judges, in construing a statute, "may substitute their own pleasure to the constitutional intentions of the legislature." But such action would be improper, for the "courts must declare the sense of the law"; they may not exercise "will" instead of "judgment."[40] Thus, Hamilton acknowledged the need for judicial accountability, but stressed that the "precautions" for the "responsibility" of the federal judiciary were to be found *only* in the Constitution's provision for impeachment. That device, he wrote, was "the only provision on the point which is consistent with the necessary independence of the judicial character."[41]

Hamilton characterized as "a phantom" any feared danger of judicial encroachments on legislative authority.[42] To him, not only was the judiciary a comparatively weak branch of government, but there was also

> "the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the

other, would give to that body upon the members of the judicial department. This is alone a complete security."[43]

If, as the Framers thus believed, the judicial branch is the only realistic check to prevent the political branches from exceeding their constitutional powers,[44] then it must follow that Congress' power to regulate federal court jurisdiction cannot be so broad as to enable Congress to divest the courts of the function of judicial constitutional review, as the bills currently under consideration would do. In the system explicated by the Framers, Congress could not have the power to make any statute review-proof by the simple expedient of divesting all federal courts of jurisdiction to hear a challenge to it. Even more abhorrent to that scheme is the notion inherent in the current bills, that a simple majority of Congress may eviscerate judicial constitutional decisions with which that majority disagrees merely by stripping the federal courts of power to consider such cases in the future. To conclude that the Framers viewed the judiciary as the fundamental check upon excesses by Congress, but also gave Congress the power by simple majority to nullify that check, is, in the words of a recent commentary, "to charge them with chasing their tails around a stump."[45]

### B. *Judicial Review and the Supremacy of Federal Law*

Federal judicial review of state laws and acts is as important to our federal system as review of federal laws and acts. Yet most of the bills now under consideration are aimed primarily at restricting this form of judicial review.

The Supremacy Clause provides that the United States Constitution, and all federal laws enacted pursuant thereto, are the "supreme Law of the Land."[46] The federal judiciary, especially the Supreme Court, is the Constitution's mechanism for enforcing the Supremacy Clause vis-a-vis the states.[47]

Many constitutional scholars believe that the Supreme Court's most important role in our constitutional system is assuring that federal law, and particularly the Constitution, is interpreted uniformly throughout the nation. In this view, the notion of a single supreme Constitution would be rendered virtually meaningless if it could be interpreted to mean different things in different states.[48]

Professor Charles Black has written:

> "There is nothing in our entire governmental structure which has a more leak-proof claim to legitimacy than the function of the courts in reviewing state acts for federal constitutionality."[49]

And Justice Holmes stated:

> "I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that determination as to the laws of the several states."[50]

These views echo those of the Framers. A major criticism of the Articles of Confederation was the weakness of the national government and the consequent disharmony among the states.[51] Hamilton regarded it as essential that, in a national union, there be a national judiciary to assure uniform interpretation of national laws:

> "If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of the uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."[52]

Hence, the Framers understood that the supremacy of federal law can only be effected if there is a single tribunal with the ultimate responsibility for deciding what the law is. As Hamilton wrote:

> "To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice."[53]

Even those at the Constitutional Convention who emphasized the independence of the states in the proposed federal system and wished to minimize the scope of the federal judiciary acknowledged that such independence was limited by the requirements of the Constitution and federal law, and that the federal judicial branch had the authority to interpret the Constitution and the laws. For example, John Rutledge of South Carolina argued at the Constitutional Convention:

> "The State Tribunals might and ought to be left in all cases to decide in the first instance, *the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments*."[54]

Over nearly two centuries, Congress has consistently recognized the necessity of appellate jurisdiction in the Supreme Court over state court decisions as the primary means of enforcing the Supremacy Clause. From the Judiciary Act of 1789[55] through the present Judicial Code,[56] Congress has always preserved the Supreme Court's appellate jurisdiction to consider whether state acts contravene the Constitution or federal laws enacted pursuant thereto.[57]

The debate over the first Judiciary Act is instructive. Although the First Congress continued the Constitutional Convention's debate over the desirability of creating inferior federal courts, the necessity of the Supreme Court's having appellate jurisdiction to assure national uniformity was not questioned.[58] Even those who "were anxious to give the Federal Courts as little jurisdiction as possible" acknowledged that state court decisions on questions of federal law must be "subject to Federal revision through the appellate power of the United States Supreme Court."[59] The universal acceptance of federal judicial constitutional review over state acts and court decisions sheds light on the intent of the Constitution's Framers, for the Judiciary Act of 1789 was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[60]

Following passage of the Judiciary Act of 1789, leading Supreme Court decisions have consistently expounded the importance to our system of constitutional federalism of federal judicial review over state acts. As one scholar observed:

> "From an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of the federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority."[61]

Justice Story's opinion in *Martin v. Hunter's Lessee*[62] reaffirmed the Supreme Court's essential role in securing a uniform system of law throughout the United States by holding that its appellate jurisdiction applied to all cases specified in Article III, whether those cases arose in state or federal courts. That landmark opinion emphasized

> "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things

> would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. . . . [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils."[63]

These principles have never been seriously questioned. In *Cohens v. Virginia,*[64] Chief Justice Marshall's opinion, upholding the Supreme Court's authority to review a state court criminal conviction that involved interpretation of a federal statute, stated that

> "the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved . . . .
>
> "[The Constitution's Framers] declare that in such cases the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction."[65]

In *Ableman v. Booth,*[66] the Supreme Court reiterated that the Supremacy Clause requires a single federal tribunal to make a final determination as to the laws of the United States and the Constitution, "for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place . . . and the government of the United States would soon become one thing in one State and another thing in another."[67]

In the face of these clear Supreme Court pronouncements, Congress has never disturbed the Supreme Court's appellate jurisdiction to hear federal constitutional challenges to state acts, either broadly or as to specific issues. To do so now, as proposed in the bills here under consideration, would violate the spirit, if not the letter, of the Supremacy Clause by eliminating the only federal means for enforcing it, and would run counter to a consistent line of historical authority affirming the Supreme Court's central role under that clause.

### C. *Judicial Review and Individual Rights*

The pending bills strike most directly at the third basic function of judicial constitutional review: protecting individual rights against abridgement by majority rule as expressed through the political branches of government.

Majority rule is not the *only* rule in the United States. Rather, our Constitution guarantees specific rights to individuals—freedom of speech, free exercise of religion, equal protection of the the law, and due process of law, to name a few—against infringement by majority will expressed as through the political branches of government. As the Supreme Court stated nearly 40 years ago in *West Virginia State Board of Education v. Barnette*:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[68]

And as James Madison wrote much earlier:

> "[I]n our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."[69]

Hence, the Founding Fathers recognized that the exercise of fundamental rights, and the individuals who exercise them, would not always win public favor, and that, from time to time, a substantial and vocal majority of the public might clamor to abridge them in certain instances. Were this not so, there would be no reason to enjoin the infringement of these rights in the Constitution.

Institutionally, the federal judiciary is the only organ of government that can be counted upon to protect individual rights when they are pitted against the will of the majority. That was why Article III, Section 1, of the Constitution made the judiciary independent of public favor by giving judges lifetime tenure and undiminished compensation throughout their judicial service.[70] It was thus intended that the courts should be free to render unpopular decisions that thwart the current majority's will when the law, as the courts interpret it, so requires.

The central role of the federal courts in protecting individual rights from encroachment by the majoritarian branches of government has been repeatedly acknowledged.[71] Chief Justice Hughes wrote in 1927:

> "In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interests or prejudice."[72]

Similarly, Justice Frankfurter, while a professor of law at Harvard, wrote:

> "The Supreme Court is indispensable to the effective workings of our federal government . . . . I know of no other peaceful method for making the adjustments necessary to a society like ours—for maintaining the equilibrium between state and federal power, for settling the eternal conflicts between liberty and authority—than through a court of great traditions free from the tensions and temptations of party strife, detached from the fleeting interests of the moment."[73]

And Justice Black observed that our federal courts "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[74]

While most commentators have emphasized the courts' role as protectors of personal liberty (freedom of speech, religion, privacy, and the like), equally important is the courts' role as guardians of private property.[75] The courts are the people's only means of enforcing the Fifth and Fourteenth Amendment prohibitions against the taking of private property for public use without just compensation and the deprivation of a person's property without due process of law.

Given the historic swings of the political pendulum, it is not inconceivable that a majority of the people of the United States, or of just one state, might someday elect a socialist government, as has already occurred in Western Europe. Should that government embark on a program that included nationalization of major industries or redistribution of private property, the judiciary would be the only institution sufficiently independent to protect the rights of private property guaranteed by the Constitution in the face of public clamor. But if the 97th Congress can legitimately curtail the federal courts' jurisdiction to adjudge selected constitutional claims, as now proposed, then a future Congress, by simple majority, could as easily eliminate the courts' jurisdiction to hear claims based on government seizures of private property without due process or just compensation.[76]

The federal judiciary's historic role as guardian of the rights of personal liberty and property guaranteed by the Constitution should not be cast aside simply because, as the Framers intended, courts sometimes render opinions that are unpopular. It is no secret that the bills presently under consideration were prompted by controversial judicial decisions—banning prayer from public schools, imposing busing as a means of integrating public schools, and permitting abortions—that are extremely unpopular in many quarters. Whether or not one agrees with the courts' decisions in these cases, it is clear that the courts were acting in their constitutional capacity as the protector of individual rights guaranteed by the Constitution. It would ill serve the long-term stability of our form of government, and would probably be unconstitutional, for Congress now to claim the power to curtail the federal courts' jurisdiction to perform this essential constitutional function.

### D. *Judicial Review and Constitutional Development*

A final objection to the practice of divesting the federal courts of jurisdiction to hear constitutional claims is that it would stultify the development of constitutional law. Our Constitution is more than the words put on paper some two hundred years ago; rather, it is a living document that grows and adapts with the experience of our people.[77]

The meaning of laws, and particularly the meaning of constitutional provisions, is not always a bright-line truth, especially as it may be applied to factual circumstances never envisioned by the Framers. For example, radio and television did not exist at the time that the First Amendment was drafted, nor indeed for most of the Amendment's history. Yet, although the technological advances raise questions of access and other matters not present in the case of other forms of publication such as newspapers, the courts have applied the principles of the First Amendment to these new means of communication.

The federal judiciary has been the primary instrument for reflecting such growth and adaptation in constitutional doctrine. Thus, one of the ironies in proposals like the present bills is that the very judicial decisions that were so unpopular that they spawned such bills would become frozen in the law forever. If the federal courts are divested of jurisdiction to engage in the normal processes of change through the development of new legal doctrine, shifts in social conditions, or turnover of judges (especially Supreme Court Justices), and if state courts continue to follow federal constitutional law, as they are required to do under the Supremacy Clause, the current state of the law on abortions, school prayer, and busing will be preserved, subject to change only by constitutional amendment.[78]

In cases where a bright-line result is not immediately apparent, the interplay between the courts and Congress and among the different courts throughout the country is an important process in the development of the law. Silencing the federal courts to speak on such issues by withdrawing their jurisdiction would deprive the nation of this important element in the lawmaking process and would be grievously unwise. Not only would the creative interplay between the inferior federal courts and the Supreme Court be lost, but so too would the interplay between the federal courts and the state courts. Three years ago, this Committee, commenting upon proposals to abolish diversity jurisdiction, stated:

> "The *Erie* requirement that federal courts apply state substantive law in diversity cases has resulted in a continuous flow between the federal and state systems of both procedural and substantive reforms. . . . Elimination of such cross-fertilization could have significant adverse effects on the general character and competence of the two systems."[79]

This process of cross-fertilization is all the more important in the realm of the basic constitutional issues, which the pending bills propose to remove from the jurisdiction of the federal courts.

## III. *THE EXTENT OF CONGRESS' AUTHORITY UNDER ARTICLE III*

Given the federal judiciary's essential role in our system of checks and balances, its basic function of enforcing the Supremacy Clause, and its task of protecting individual rights, does it stand to reason that Congress has the constitutional power to curtail those functions by limiting the courts' jurisdiction as the proponents of the current bills contend? It is with that question in mind that we now examine the Constitution's provisions granting Congress a measure of control over federal court jurisdiction, which are cited as the constitutional authorization for most of the pending bills.

Congress' power to regulate the jurisdiction of the federal courts is conferred by Article III of the Constitution (emphasis added):

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish.* The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> "Section 2. . . .
>
> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned [within the judicial power of the United States], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*"[80]

Historically, the federal judiciary has never exercised jurisdiction as broad as the full judicial power defined in Article III. From the Judiciary Act of 1789 onward, statutes defining the jurisdiction of the Supreme Court and lower federal courts have never utilized the entire reach of the "judicial power" defined in Article III, Section 2, and the courts have never claimed jurisdiction to reach the categories of cases outside the statutory definition. To cite two contemporary examples: (1) no federal court has original jurisdiction to hear diversity claims that do not meet the statutory jurisdictional amount,[81] even though there is no such limitation on diversity jurisdiction in Article III; (2) the Supreme Court does not have appellate jurisdiction over diversity cases tried in the state courts that do not involve a federal question,[82] even though such jurisdiction would be within the reach of Article III.

On the other hand, since the Judiciary Act of 1789, statutes defining federal court jurisdiction have regularly conferred broad jurisdiction upon the federal judiciary within the definition of "judicial power" contained in Article III of the Constitution. Congress has not sought to use its power over federal court jurisdiction to erode the judiciary's central role in interpreting the Constitution and federal law or in exercising the responsibility of judicial constitutional review. Nor has it previously attempted to define federal court jurisdiction in terms of substantive issues, as opposed to neutral principles such as citizenship of the parties or amount in controversy. Because of this, there has been little occasion for the courts to consider the metes and bounds of Congress' control over federal court jurisdiction.[83] Most of the statements in judicial opinions concerning the extent of Congress' power over federal court jurisdiction are therefore dicta, and cannot be viewed as controlling doctrine.[84]

This much, however, seems clear: There is no support, from the debates surrounding the adoption of Article III or otherwise, for the proposition that the Framers intended Article III to confer upon Congress power to strip the federal courts of jurisdiction to hear constitutional claims or to abrogate the federal courts' essential function of judicial constitutional review in response to unpopular, or even erroneous, judicial decisions.[85] Nor is there authority for the proposition that Congress' power to regulate jurisdiction may be used as an indirect means of undermining judicial opinions with which Congress disagrees.[86]

The statements in *The Federalist Papers* that the power of impeachment was intended to be the *only* check on the federal judiciary[87] strongly indicate that the Framers never intended Congress' Article III control over jurisdiction to be so used. Rather, read in context, it appears that Congress' regulation of federal court jurisdiction was intended solely to permit Congress, through policy-neutral criteria, to allocate judicial business among the federal courts, to prevent the federal courts from becoming overburdened by cases that do not involve substantial federal claims, and to provide orderly procedures for the federal judiciary's exercise of its jurisdiction.[88] This view is supported by the manner in which Congress has actually exercised its Article III powers to regulate federal court jurisdiction since the beginning of the Republic; Congress has never curtailed the courts' jurisdiction to adjudicate constitutional claims as proposed in the jurisdiction-stripping bills.

The unprecedented nature of the bills here under consideration poses serious doubts about their constitutionality as well as their wisdom. While the manner in which Congress has historically exercised its jurisdictional power cannot alter the Constitution's grant of that power, it can illuminate the proper meaning of that grant. As Justice Frankfurter explained:

> "The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply imbedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[89]

* * *

We turn now to specific consideration of the constitutional language relied upon as authority for enactment of the pending bills. Since Congress' power over Supreme Court and lower court jurisdiction depends upon different provisions of Article III, those provisions must be analyzed separately.

### A. *Supreme Court Jurisdiction*

The Constitution confers original jurisdiction upon the Supreme Court in a relatively narrow range of cases involving diplomatic personnel or in which a state is a party.[90] Congress can neither add to nor subtract from the original jurisdiction thus conferred.[91]

The Supreme Court's most important role in our system is thus as an appellate court, hearing appeals from both inferior federal courts and state courts on issues of federal constitutional, statutory, and administrative law. As discussed above (Part II), the history of the Constitution indicates that the Supreme Court was intended to be the final arbiter of federal law; to review the constitutionality of acts of Congress and federal executive actions; to review the constitutionality of state enactments in light of federal statutory and constitutional law, thereby serving as the primary instrument for enforcing the Supremacy Clause; and to protect individual rights from encroachments by the majoritarian branches of the federal and state governments.

Such power as Congress has over the Supreme Court's appellate jurisdiction is conferred by the Exceptions Clause of Article III, Section 2, which grants such jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." If Congress has authority to restrict the Supreme Court's appellate jurisdiction to hear constitutional claims, as proposed in the pending bills, it must derive from this clause.

Those who advocate such authority for Congress contend that the Exceptions Clause, read literally, gives Congress plenary power over the Supreme Court's appellate jurisdiction. One answer to this contention is that the Constitutional Convention voted down a proposal that would have expressly given Congress such plenary power. In the course of the Constitutional Convention's consideration of Article III, a motion was made to replace a provision that was substantively identical to the Exceptions Clause as enacted with the following language: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct." The Convention rejected this proposal, and instead adopted the Exceptions Clause in its present form.[92]

Moreover, while such a literal reading of a single phrase might be acceptable in construing a detailed regulatory statute, it is not appropriate in constitutional interpretation. In the words of Chief Justice Marshall, "we must never forget, that it is a constitution we are expounding."[93] It is thus axiomatic that the Constitution necessarily must be read as a broad outline of our system of government, and its individual provisions must be read in the context of the organic whole.[94] Proper interpretation of the Constitution requires consideration of its spirit, as well as its letter, and the spirit should control over an interpretation that would defeat an essential tenet of the Constitution, such as the doctrine of separation of powers.

Accordingly, the Exceptions Clause must be read in the context of the broad language of Article III establishing the judicial power of the United States. It would be curious drafting, and contrary to established principles of constitutional, statutory, *and* contractual construction, if an "exception" in the third paragraph of the Article were read to grant to Congress the power totally to efface the Supreme Court's appellate jurisdiction granted in the same Article—especially in the absence of any historical evidence that this clause was intended to permit, at Congress' option, a radical diminution of the constitutional role of the Supreme Court.

There was no discussion in the Constitutional Convention of any such far-reaching effect to be attributed to the Exceptions Clause. Nor was there any suggestion of any such significance in the preparation of earlier drafts of the Constitution.[95] Although the clause was debated at the Constitutional Convention, the point at issue was the scope of the Supreme Court's appellate jurisdiction with respect to matters of fact, which some considered to be an infringement of the cherished right to a trial by jury.[96] As Hamilton observed, "The propriety of this appellate jurisdiction has scarcely been called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact."[97] As one constitutional scholar has noted, the debate ended in a compromise that left the First Congress to struggle with the scope of the Supreme Court's appellate jurisdiction over factual determinations under the Exceptions Clause:

> "So complicated were the varying practices [of review of facts] that it was concluded to leave the problem for handling by the Congress through the medium of the 'exceptions' clause, fashioned to meet the 'principal criticism' of the appellate jurisdiction, its inclusion of matters of 'fact.' "[98]

In his well-known "Dialogue," Professor Hart rejected as "preposterous" the notion that the Exceptions Clause might be read "as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether."[99] According to Hart, the measure of Congress' power over the Supreme Court's appellate jurisdiction under the Exceptions Clause "is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[100] As Professor Ratner pointed out, this interpretation of the limits of the Exceptions Clause is buttressed by legal usage known to the Framers when the Constitution was drafted, by which an "exception" cannot be construed to nullify the rule that it limits or to negate an essential part of what was granted.[101]

Judicial precedent on the scope of Congress' power under the Exceptions Clause is not illuminating. As noted above, because Congress has never challenged the Supreme Court's jurisdiction to hear constitutional claims, there are no definitive rulings on the extent or limits of Congress' power.[102] While some cases contain extravagantly broad statements concerning Congress' power over the Supreme Court's jurisdiction, [103] the statements are dicta, for the cases did not involve any attempt by Congress to limit the Court's jurisdiction to hear constitutional claims.[104] Only two Reconstruction-era cases, *Ex parte McCardle*[105] and *United States v. Klein*,[106] actually addressed the scope of Congress' power under the Exceptions Clause, and they point in opposite directions.

Those who urge that the Exceptions Clause gives Congress plenary power to divest the Supreme Court of appellate jurisdiction most often cite *Ex parte McCardle* as the leading authority for this view.[107] In 1867, William H. McCardle, a newspaper editor in Mississippi, had been arrested by the army pursuant to the Military Reconstruction Act[108] passed earlier the same year, which subjected the South to federal military command. Based upon anti-reconstructionist editorials McCardle had published, he was charged with libel, disturbing the peace, inciting insurrection, and impeding reconstruction. He petitioned the federal circuit court for a writ of habeas corpus, challenging the constitutionality of the Military Reconstruction Act, under a Habeas Corpus Act passed by the same Reconstruction Congress in 1867.[109] There was some irony in this: the 1867 Habeas Corpus Act was passed for the purpose of advancing reconstruction by expanding the federal courts' powers to release former slaves and others who were being unlawfully held prisoner by the southern states.[110] But the terms of the statute were not confined to prisoners in state custody, and McCardle, an anti-reconstructionist, was using it as a device to challenge the very reconstruction that the act was intended to promote.

The circuit court denied McCardle's petition, and he appealed to the Supreme Court under a provision of the 1867 Act. The Government moved to dismiss the appeal, and the Supreme Court denied the motion.[111] The Government then faced the prospect that the Supreme Court, on reaching the merits, might declare one of the cornerstones of reconstruction policy to be unconstitutional. To avert this threat, while McCardle's appeal was still pending, Congress repealed the provision of the 1867 Habeas Corpus Act that allowed a direct appeal to the Supreme Court.[112] In light of that repeal, the Supreme Court dismissed the appeal in a terse opinion, containing the following language relied upon by proponents of the current bills:

> " . . . The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

> "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[113]

In reading *Ex parte McCardle*, it must be borne in mind that the opinion was written under the most intense imaginable pressure at the peak of radical Reconstruction. As one commentary has noted, "With troops in the streets of the capital and the President of the United States on trial before the Senate, a less ideal setting for dispassionate judicial inquiry could hardly be imagined."[114] And as Justice Douglas once observed, "There is a serious question whether the *McCardle* case could command a majority view today."[115]

Moreover, the full *McCardle* opinion shows that it does not support so broad a view of Congress' power over the Supreme Court's jurisdiction as the above-quoted excerpt might suggest.[116] While the opinion terms the 1868 repealer act an "exception" to the Court's appellate jurisdiction, in fact the repealer merely withdrew a *procedure* for appealing to the Supreme Court under the 1867 Habeas Corpus Act enacted the preceding year. The repealer did not narrow the Supreme Court's *subject matter* jurisdiction—that is, it did not limit the kinds of claims that the Supreme Court could hear, assuming they came to it by an available route.[117] The *McCardle* opinion made this very point:

> "Counsel seems to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction

any cases but appeals from Circuit Courts under the act of 1867. *It does not affect the jurisdiction which was previously exercised.*"[118]

The Supreme Court made the distinction even plainer later the same year in *Ex parte Yerger.*[119] There, the Court considered another appeal by another anti-reconstructionist newspaper editor held in military custody under the Military Reconstruction Act. Like McCardle, Yerger was charged with impeding reconstruction. Like McCardle, he petitioned a circuit court for a writ of habeas corpus under the Habeas Corpus Act of 1867. The circuit court denied Yerger's petition, and Yerger sought review by the Supreme Court. But unlike McCardle, Yerger invoked the Supreme Court's appellate jurisdiction under the procedures provided by the Judiciary Act of 1789, not the repealed provision for direct appeals of the Habeas Corpus Act of 1867. The Supreme Court held, over objection by the Government, that it had appellate jurisdiction under the prior law to hear appeals in habeas corpus cases brought under the 1867 Act, and that this jurisdiction was not affected by the 1868 repealer act.[120] Significantly, the Court intimated that any attempt through legislation to remove entirely the Supreme Court's appellate jurisdiction in habeas corpus cases would strike at one of the Court's essential constitutional functions and raise serious constitutional questions.[121]

*United States v. Klein,*[122] the second case to address directly Congress' authority to legislate exceptions to the Supreme Court's appellate jurisdiction, was decided three years after *Ex parte McCardle.* That opinion disposed of any remaining impression that the Exceptions Clause gave Congress plenary power to deprive the Supreme Court of appellate jurisdiction. A Civil War statute authorized suits in the Court of Claims to recover captured property by owners who were loyal to the Union or had been pardoned by the President. Klein had received a pardon that recited his previous disloyalty. Based upon his pardon, Klein brought an action in the Court of Claims and recovered judgment under the statute. While an appeal to the Supreme Court was pending, Congress passed a statute purporting to deprive the Court of Claims and the Supreme Court of jurisdiction in any case where a presidential pardon recited disloyalty and to direct that any such case be dismissed. The Supreme Court held that this was an attempt to prescribe a rule of decision in cases before the judiciary, violated the principle of separation of powers, and was not a permissible use of Congress' Article III powers over jurisdiction.[123] The Court opined:

> "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . .
>
> "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> "It is of vital importance that these powers be kept distinct."[124]

The power claimed in the present bills to divest the Supreme Court of appellate jurisdiction to hear constitutional claims goes well beyond anything Congress has done in the exercise of its Article III powers at least since the turbulent Reconstruction era. Since the pending bills erode the Supreme Court's essential role in our constitutional system of government, they cannot be found to be within Congress' power under the Exceptions Clause of Article III in the absence of compelling authority. But that authority is not to be found in the history of Article III, judicial decisions under that Article, or the weight of scholarly authority concerning the Article's intent.

### B. *Lower Court Jurisdiction*

The foregoing analysis shows that Congress' power to regulate the Supreme Court's jurisdiction under Article III does not give Congress power to withdraw the Supreme Court's jurisdiction to hear constitutional claims. The issue of Congress' power under Article III to divest the lower federal courts of jurisdiction to hear constitutional claims presents a closer question. However, taking into account other provisions of the Constitution and considerations of sound policy toward the judiciary, the case against the jurisdiction-stripping proposals as applied to the lower federal courts is no less compelling.

### 1. *Article III*

Congress' control over lower court jurisdiction derives not from the Exceptions Clause, but from its power under Article III, Section 1, to "ordain and establish" courts inferior to the Supreme Court.[125] One early view, expressed by Justice Story,[126] was that Article III *required* Congress to establish lower federal courts to exercise original jurisdiction in all cases within the constitutionally defined judicial power, other than those in which the Supreme Court had original jurisdiction. Under this view, Congress' discretion was limited to deciding where, what number, and what character of lower federal courts to establish, and how jurisdiction should be allocated among them.[127]

The premise underlying this view—that the entire judicial power defined by Article III must be vested in the federal judiciary—has since been rejected.[128] Indeed, Justice Story's position ignored the historical evidence that the Framers were divided as to the desirability of establishing any lower federal courts and intended to leave that decision to Congress.[129]

The prevailing view has been that the Constitution gives Congress absolute discretion as to whether to establish any lower federal courts. From this it is said to follow that Congress has plenary control over the jurisdiction of such lower courts as it chooses to create.[130] Some modern scholars have questioned the premise underlying this view, arguing that federal courts of original jurisdiction are now necessary to carry out the Constitution's plan for the federal judiciary. Professor Eisenberg argues that, because of the proliferation of federal law and federal court caseloads since the Framers' era, lower federal courts have become a constitutional necessity to administer federal justice; he argues that, if the federal courts were abolished and their cases turned over to the state courts, the burden of harmonizing conflicting interpretations of federal law by the 50 state court systems and vindicating federal rights would be more than the Supreme Court, exercising its appellate jurisdiction, could bear.[131] Professors Redish and Woods argue that lower federal courts are constitutionally necessary to restrain unconstitutional acts by federal officials, since state courts are generally without power to award relief in such cases.[132]

Whether or not it was constitutionally required to do so, the First Congress did establish a system of lower federal courts in the Judiciary Act of 1789, and Congress has since then consistently endowed those courts with a broad measure of the judicial power defined in Article III. The lower federal courts have long had original jurisdiction over diversity cases and cases arising under the Constitution and federal laws. Exercising that subject matter jurisdiction, the lower federal courts have been important instruments of judicial constitutional review, although their role in enforcing the Supremacy Clause vis-a-vis the states is not so central as that of the Supreme Court. Congress has never before enacted legislation to deprive the lower federal courts of jurisdiction to hear cases arising under the Constitution generally, nor on an issue-by-issue basis, as proposed in the pending bills.

The lower federal courts play a vital role as courts of first instance in which federal rights can be vindicated. In *Mitchum v. Foster*,[133] the Supreme Court reaffirmed this role in tracing the history of 28 U.S.C. § 1983 to its origin in the Civil Rights Act of 1871. The Court noted that this provision "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."[134] The Court continued:

> "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from un-

> constitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' . . . And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young*, 209 U.S. 123; cf. *Truax v. Raich*, 239 U.S. 33; *Dombrowski v. Pfister*, 380 U.S. 479."[135]

For individuals seeking to enforce federal rights, the ability to bring suit in a federal forum rather than a state court is significant. As a leading study by the American Law Institute concluded, "federal courts are more likely to apply federal law sympathetically and understandingly than are state courts."[136]

An important advantage of the lower federal courts over most state courts in protecting constitutional rights is the independence of federal judges from political influence, based upon their appointment for lifetime terms and their guarantee of undiminished compensation.[137] Judge McGowan of the D.C. Circuit saw the lower federal courts' role in desegregating the public schools as a prime example of that advantage:

> "[I]s it conceivable that the job could have been entrusted entirely to the state courts, bearing in mind the differences in loyalties and the vulnerability to local pressures inherent in an elective system of judges? The federal judges themselves have, even with the security provided them by the Constitution, found the going hard. It is not fanciful to think that it would have been too much for unsheltered state judges . . . . Certainly it would have been hard to ask them to risk such an exposure with so few shields."[138]

Another important role of the lower federal courts is to develop a body of empirical evidence that the Supreme Court can later use in formulating constitutional doctrine. The Supreme Court will often permit a difficult issue to germinate among the lower courts before it accepts a case to resolve the issue.[139] From that process of grappling with a thorny issue through several different cases in different courts, a more judicious final resolution may result—or, at least, the areas of uncertainty and disagreement may be crystallized. Then, when the Supreme Court announces doctrine, it often does so in broad terms, leaving to the lower federal courts the task of fashioning from that doctrine decisions in concrete cases. As Judge Craven of the Fourth Circuit explained, the Supreme Court

> "quite sensibly is willing to take the time to allow the inferior courts to experiment with words, giving content and meaning to the doctrine which has been expounded. The truth is that the Court is wise enough to know that it does not know precisely what ought to be done and must be required. Like the rest of us, the Court learns from experience—the experience of the inferior federal courts. Trial balloons constantly soar aloft from the United States District Courts. Some are shot down in flames by the United States Circuit Courts of Appeals, while others are allowed to orbit indefinitely."[140]

In sum, the lower federal courts have historically played a vital role in vindicating constitutional rights and in promoting national uniformity in the interpretation of the Constitution and the federal laws. The federal courts have successfully functioned side-by-side with the state courts. As a practical matter, the proposed limitations on the lower federal courts (even assuming that an avenue of review by the Supreme Court were left open) would so inundate the Supreme Court as the sole federal arbiter of such issues that the effectiveness of the federal judicial branch would be impaired. We see no compelling interest to justify this kind of radical tampering with the present judicial system and the form in which it has functioned for so many years. Indeed, given the lower federal courts' present-day role in that system, such tampering may now be unconstitutional, whatever Congress could have done in 1789.

### 2. *Other Constitutional Provisions*

Aside from the limitations inherent in Article III of the Constitution and the historic role of the judiciary in our system of government, other constitutional provisions and considerations should constrain Congress from enacting any of the pending bills. Whatever the scope of Congress' authority over federal court jurisdiction under Article III, Congress may not exercise that authority in a manner that contravenes any other provision of the Constitution. While Congress is acknowledged to have plenary power to regulate interstate commerce,[141] for example, no one would suggest that Congress constitutionally could use that power to prohibit interstate transport of political pamphlets in violation of First Amendment guarantees, or to seize property moving in interstate commerce without due process of law in disregard of the Fifth Amendment. Congress' exercise of its authority over federal court jurisdiction, like the exercise of all of its other powers, is "entirely subject to all of the other provisions of the Constitution that constrain government power."[142]

As the Supreme Court observed:

> "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."[143]

By the same token, Congress' authority over jurisdiction may not constitutionally be used to shield government actions from judicial constitutional review.[144]

#### (a) *The Due Process Clause*

The Fifth Amendment prohibits the Government from depriving any person of life, liberty, or property without due process of law. Judicial constitutional review of government actions is an essential element of due process. While Congress has never before put the issue to the test by impairing federal court jurisdiction to exercise such review, several cases have intimated that a law eliminating any opportunity for federal judicial review in any class of cases would violate the Due Process Clause.[145]

Hence, Congress' authority over federal court jurisdiction under Article III is limited by the requirements of the Fifth Amendment's Due Process Clause.[146] And due process requires that there be a judicial remedy for someone claiming to be aggrieved by a government's violation of the Constitution.[147]

Applying these due process principles, the Supreme Court disregarded a section of the Military Selective Service Act[148] that purported to prohibit any judicial review of selective service classifications except in a criminal prosecution for violation of the Act and upheld a registrant's right to bring an action to enjoin an unlawful classification practice.[149] And the Court of Appeals for the District of Columbia Circuit refused to give effect to a provision of the Federal Deposit Insurance Act[150] that purported to deprive the courts of jurisdiction to review certain administrative actions taken pursuant to it.[151] Other cases have carefully scrutinized jurisdiction-limiting statutes according to these due process principles.[152]

In light of these precedents, it is extremely doubtful that the bills withdrawing jurisdiction in draft and military classification cases would withstand constitutional scrutiny. The Due Process Clause would not tolerate subjecting a citizen to loss of liberty by being inducted into the military without an opportunity for some form of judicial review of the law ordering that loss of liberty.[153] It is equally doubtful that Congress could constitutionally require the federal courts to enforce federal legislation—for example, by trying individuals for the crime of refusing induction into the military—but deny those courts jurisdiction, as two of the pending bills would do, to consider a challenge to the law's constitutionality by a person against whom enforcement is sought.[154]

Another due process principle limiting Congress' power over judicial jurisdiction is the requirement that all persons receive equal treatment under the law.[155] Statutes that would eliminate jurisdiction to hear narrow categories of constitutional claims violate this principle by invidiously discriminating against those who assert the particular claims thus singled out.[156] All of the bills presently under consideration save one (H.R. 114) suffer this infirmity. They each single out narrow categories of constitutional claims for jurisdictional oblivion—those involving public prayer, abortion, school desegregation, and sex discrimination in the military.

Since closing off federal judicial redress to persons claiming violations of specific constitutional rights impinges upon fundamental liberties, such jurisdictional limitations should be subjected to strict scrutiny by the courts and can satisfy the equal protection component of the Due Process Clause only where they are "shown to be *necessary* to promote a *compelling* governmental interest."[157] Yet it is doubtful that these jurisdictional limitations would satisfy even the lower standard applicable where fundamental rights are not involved: a statutory classification must bear a reasonable relationship to a permissible governmental purpose.[158] No legitimate, let alone compelling, governmental interest is served by curtailing federal court jurisdiction to hear specified constitutional claims. No serious argument can be made that such jurisdictional limitations are intended to promote judicial efficiency or any similar interest legitimately within Congress' purview under Article III.[159] And a desire to alter some judicial interpretations of the Constitution with which a majority of the Congress may disagree is not a licit governmental purpose that will satisfy the constitutional standard.[160]

### (b) *Specific Constitutional Rights*

Statutes that would eliminate federal court jurisdiction to hear specified constitutional claims, as proposed in the present bills, may well be held to be impermissible abridgements of the constitutional rights underlying the claims as to which jurisdiction is denied. For example, the bills that would eliminate any federal judicial remedy against governmental violations of the First

Amendment through school prayer programs would themselves be an abridgement of First Amendment rights.[161]

It is established that, where the purpose and effect of a law is to obstruct judicial protection of constitutional rights, the law is unconstitutional unless it is necessitated by compelling and legitimate governmental interests.[162] As shown above, no such showing of justification can be made for bills like those here considered. Indeed, the present bills appear to have no purpose other than limiting constitutional rights as those rights have been enforced by the courts.

In *Faulkner v. Clifford*,[163] a district court invalidated a statutory provision that purported to deprive all federal courts of jurisdiction to review selective service classifications except in criminal prosecutions of registrants for violation of the Military Selective Service Act.[164] There, a registrant was punitively classified I-A for returning his registration card as a protest against the draft. The registrant commenced a civil action to challenge the punitive classification, arguing that his First Amendment right to protest the draft had been infringed. The Government moved to dismiss for lack of jurisdiction based on the statutory prohibition against judicial review. The court held that denying the registrant a judicial forum for his constitutional claim impermissibly chilled his exercise of First Amendment rights, and ruled the jurisdictional limitation to be unconstitutional as so applied.[165]

### (c) *Structural Provisions*

As discussed above (Part II), depriving the federal judiciary of jurisdiction to hear constitutional claims threatens the basic structure of our government and particularly the principle of separation of powers. As Chief Justice Burger wrote in 1976:

> "Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government. . . .

> "Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, [the statute in question] can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles."[166]

We have already discussed how jurisdictional limitations of the sort proposed would offend one important structural provision of the Constitution, the Supremacy Clause (Part IIB above). Such jurisdictional limitations, by seeking indirectly to alter authoritative judicial interpretations of the Constitution, may also be regarded as an impermissible attempt to circumvent the process of constitutional amendment.[167]

We do not take issue with those who point out that, ultimately, legislative supremacy is at the heart of our democratic system. But the established constitutional mechanism for resolving a profound and lasting disagreement between the judicial branch and Congress, as the elected will of the people, as to the meaning of a constitutional provision, is amendment of the Constitution, not tampering with the jurisdiction of the courts. Under Article V, an amendment to the Constitution can be proposed by two-thirds of both houses of Congress or the application of legislatures of two-thirds of the states, and such amendment becomes effective when ratified by three-fourths of the states. The process of amending the Constitution was not intended to be a simple matter, but rather one that required great deliberation. Much more was required than the simple majority vote necessary for ordinary legislation.

The proposed jurisdictional limitations also implicate another important structural provision of the Constitution, the one governing impeachment. As noted above, the Framers intended impeachment to be the *sole* check on the judiciary.[168] Impeachment was intended to be much harder to achieve than ordinary legislation. High crimes and misdemeanors must be proven, and a two-thirds vote by the Senate is required for conviction.[169]

Were Congress able to act by simple majority upon every disagreement with the judiciary's constitutional interpretations by divesting the courts of jurisdiction, both of these carefully constructed safeguards—constitutional amendment and impeachment—requiring supermajority action by Congress and the people would be wholly avoided. Such a result would impair the tripartite balance of power in our constitutional system and would be inconsistent with the intentions of the draftsmen of the Constitution.

## *CONCLUSION*

For the reasons here discussed, the Committee concludes that legislation to divest the federal courts of jurisdiction to hear constitutional claims, such as proposed in the pending bills, is probably unconstitutional and certainly unwise. The basic constitutional plan of separation of powers, and judicial constitutional review as an essential part of this plan, have served the nation well for two centuries. The plan should not be tampered with because some Supreme Court constitutional decisions are perceived to be out of step with public favor or even wrong.

We believe that, when faced with proposals to divest the federal courts of jurisdiction or to undermine their independence, Congress should be guided by the example of self-restraint exhibited by the 75th Congress when it rejected President Roosevelt's court-packing proposal. As the Senate Judiciary Committee put it in 1937:

> "Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen even against the Government itself, create the vicious precedent which must necessarily undermine our system? . . .

". . . Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

". . . Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American Judiciary from attack as long as this Government stands."[170]

*August 1981*

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* Jack David is presently the Chair of the Committee.

## *APPENDIX*

### LIST OF PENDING BILLS TO LIMIT FEDERAL COURT JURISDICTION TO HEAR CONSTITIONAL CLAIMS

| Bill No. | Sponsor | Subject |
|---|---|---|
| H.R. 72 | Ashbrook | Prayer |
| H.R. 73 | Ashbrook | Abortion |
| H.R. 114 | Bennett | State Judgments |
| H.R. 311 §106 | Hansen | Prayer |

| | | |
|---|---|---|
| H.R. 326 | Holt | Prayer |
| H.R. 340 | Holt | School Desegegation |
| H.R. 408 | Quillen | Prayer |
| H.R. 761 | McDonald | School Desegregation |
| H.R. 865 | P. Crane | Prayer |
| H.R. 867 | P. Crane | Abortion |
| H.R. 869 | P. Crane | School Desegregation |
| H.R. 900 §2 | Hyde, *et. ano.* | Abortion |
| H.R. 989 | McDonald | Prayer |
| H.R. 1079 | Hinson | School Desegregation |
| H.R. 1180 | Ashbrook | School Desegregation |
| H.R. 1335 | Nichols | Prayer |
| H.R. 2047 | Moore | School Desegregation |
| H.R. 2347 | P. Crane | Prayer |
| H.R. 2365 | Evans | Armed Forces |
| H.R. 2791 | Evans | Armed Forces |
| H.R. 3225 | Mazzoli, *et al.* | Abortion |
| S. 158 §2 | Helms | Abortion |
| S. 481 | Helms, *et ano.* | Prayer |
| S. 528 | Johnson, *et al.* | School Desegregation |
| S. 583 | Hatch | Abortion |

## *FOOTNOTES*

[1] 1 A. de Tocqueville, *Democracy in America* ch. VI, at 107 (Bradley ed. 1945).

[2] For example, bills in the 1950s to deprive the federal courts of jurisdiction to hear challenges to loyalty-oath requirements or subversive activities laws; bills to eliminate federal court jurisdiction over legislative apportionment cases in the wake of the landmark decision in Baker v. Carr, 369 U.S. 186 (1962); earlier proposals to divest the courts of jurisdiction over challenges to religious observances in public schools; and bills introduced in the 1950s and again in the early 1970s which, like some of the present bills, would have deprived the federal courts of jurisdiction to order busing as a means of remedying school segregation. For descriptions and discussions of prior proposals to limit federal court jurisdiction to hear constitutional claims, *see, e.g.*, Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585, 593 (1975); Eisenberg, *Congressional Authority To Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 498-99 (1974); Freund, *Storm Over the American Supreme Court*, 21 Modern L. Rev. 345 (1958); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 159 (1960); Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229, 230 (1973); Note, *Governance*, 13 Ga. L. Rev. 1513, 1522-25 (1979); Note, *The Nixon Busing Bills and Congressional Power*, 81 Yale L.J. 1542 (1972); Kaufman, *Congress v. The Court*, N.Y. Times, Sept. 20, 1981, § 6 (Magazine), at 44, 48, 54. *See also* Nagel, *Court-Curbing Periods in American History*, 18 Vanderbilt L. Rev. 925 (1965) (statistical analysis of bills to limit the courts' powers); Note, *Governance, supra* at 1517-18 (examples of legislation to limit courts' jurisdiction in other countries).

[3] U.S. Const. art. VI, cl. 2.

[4] 67 A.B.A.J. 1082 (1981). This action by the ABA's House of Delegates was supported by a well-reasoned report from its Special Committee on Coordination of Federal Judicial Improvements, which concludes:

> "The real issue, the only issue, is whether, as a matter of policy and of constitutional permissibility, this nation is going to adopt a device whereby each time a

> decision of the Supreme Court or a lower court offends a majority of both houses of Congress, the jurisdiction of the federal courts to hear that issue will be stripped away. We do not believe that is a system the Framers intended nor one that we should strive to institute."

*Id.*

[5] For example, Former Solicitor General Robert Bork, although critical of many modern Supreme Court decisions, argued that enactment of the present jurisdiction-stripping bills "would not be in keeping with the spirit of the Constitution nor would it be in keeping with its structure." 67 A.B.A.J. 1095 (1981). The Reagan Administration, so far as we are aware, has not yet taken an official position. A Justice Department spokesman has said that the Justice Department "will not be announcing" its position on the bills. *Id.*

[6] Kaufman, *supra* note 2, at 44. *See also* Kaufman, *Let the Founding Fathers Stir: Tampering With the Courts' Power Would Invite Instability*, L.A. Times, Mar. 25, 1981, § 2, at 7.

[7] H.R. 72, 326, 408, 865, 989, 1335, and 2347, 97th Cong., 1st Sess. (1981).

[8] S. 481, 97th Cong., 1st Sess. (1981).

[9] *E.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[10] S. 450, 96th Cong., 1st Sess. §§ 11-13 (1979).

[11] It is doubtful that these bills would have the intended effect of removing school prayer cases from the federal courts, since they would divest the federal courts of jurisdiction only to hear cases involving "voluntary" prayer. Therefore, under the bills, federal courts would have to decide the threshold question of whether a particular religious observance is "voluntary." One of the underpinnings of the Supreme Court's decisions on school prayer is that, particularly in dealing with impressionable schoolchildren, there is an element of subtle coercion in any religious observance led by a school authority and participated in by the majority of pupils, and participation in such an observance is therefore not entirely voluntary. Engel v. Vitale, 370 U.S. 421, 430-31 (1962); *see* Abington School Dist. v. Schempp, 374 U.S. 203, 228, 288-93 (1963) (concurring opinion). (However, the Court has held squarely that even absent coercion, government sponsorship of prayer in public schools violates the Establishment Clause of the First Amendment. Engel v. Vitale, *supra* at 430.) Furthermore, questions of fact that affect constitutional rights are exclusively within the province of the federal judiciary, and ultimately the Supreme Court, to decide. *E.g.*, Crowell v. Benson, 285 U.S. 22, 60 (1932) (Hughes, C.J.):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

*See id.* at 58-61. *See also* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872).

[12] U.S. Const. art. VI, cl. 2.

[13] H.R. 311, 97th Cong., 1st Sess. § 106 (1981).

[14] Harris v. McRae, 100 S. Ct. 2671 (1980); Belotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

[15] Specifically, H.R. 73 and S. 583 would forbid the issuance by any federal court other than the Supreme Court of "any restraining order or temporary or permanent injunction" in cases involving "any Federal or State law" that "prohibits, limits, or regulates abortion," abortion clinics, or persons that provide abortions, and in cases involving any federal or state law that "prohibits, limits, or regulates the provision at

public expense of funds, facilities, personnel, or other assistance for the performance of abortions." H.R. 73, 97th Cong., 1st Sess. (1981); S. 583, 97th Cong. 1st Sess. (1981).

[16] H.R. 90, H.R. 3225, S. 158, 97th Cong., 1st Sess. (1981).

[17] The availability and timing of traditional judicial remedies may have consequences for the realization of substantive constitutional rights. *See, e.g.*, Oestereich v. Selective Service Bd., 393 U.S. 233 (1968) (pre-induction judicial review of Selective Service classifications); Freedman v. Maryland, 380 U.S. 51 (1965) (motion picture censorship).

[18] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26-31 (1971) (Burger, C.J.); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (Burger, C.J.); *see* Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2.

[19] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30-31 (1971).

[20] Thus, H.R. 340, 97th Cong., 1st Sess. (1981), provides that no federal court shall have jurisdiction to render a decision "the effect of which would be to require that pupils be assigned to a particular school on the basis of their race, color, religion, or national origin." H.R. 761, 97th Cong., 1st Sess. (1981), provides that no federal court shall have jurisdiction to render a decision "which would have the effect of requiring any individual to attend any particular school." Two identical bills, H.R. 1079 and H.R. 1180, 97th Cong., 1st Sess. (1981), provide that "no court of the United States shall have jurisdiction to require the attendance at a particular school of any student because of race, color, creed, or sex."

[21] At the time H.R. 2365 was introduced, a three-judge federal district court had ruled that exempting women from the application of the Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.*, invidiously discriminated against males and therefore violated the equal protection component of the Fifth Amendment's Due Process Clause. The Supreme Court subsequently reversed this decision on appeal and upheld the constitutionality of a draft law that applies only to males. *See* Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa. 1980), *enforcement stayed*, 101 S. Ct. 1 (1980), *rev'd*, 101 S.Ct. 2646 (1981). *See generally* Committee on Federal Legislation, *If the Draft Is Resumed: Issues for a New Selective Service Law*, 36 Rec. A.B. City N.Y. 98, 105-10 (1981).

[22] *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Owens v. Brown, 455 F. Supp. 291 (D.C. 1978).

[23] Redish & Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 49-50, 81-92 (1975), which analyzes a line of authorities primarily based upon Tarble's Case, 80 U.S. (13 Wall.) 397 (1871). However, in contrast, Professor Hart suggests that "in the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." He notes that Congress cannot limit the state courts' jurisdiction to hear claims under the Federal Constitution. "The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution." Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1401 (1953).

[24] *The Federalist No. 47*, at 301 (New Am. Lib. ed. 1961).

[25] *Id. No. 48*, at 308.

[26] *E.g.*, Buckley v. Valeo, 424 U.S. 1, 120-24 (1976).

[27] U.S. Const. art. III, § 1; *see* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22-23 (1955); O'Donoghue v. United States, 289 U.S. 516, 529-31 (1933); Evans v. Gore, 253 U.S. 245, 249-50 (1920); Redish & Woods, *supra* note 23, at 78-79 & n.157 (1975).

[28] Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U.L. Rev. 1, 5 & n.3, 8-10, 29 (1951) (citing historical authorities); Kaufman, *supra* note 2, at 56. For example, Hamilton explained:

> "The inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. . . .
>
> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."

*The Federalist Nos. 78-79*, *supra* note 24, at 470-72. *See also* text accompanying note 69 *infra* (quoting Madison).

[29] 5 U.S. (1 Cranch) 137 (1803).

[30] *Id.* at 177.

[31] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[32] *The Federalist No. 81*, *supra* note 24, at 483.

[33] Thus, Hamilton emphasized:

> "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

*Id. No. 78*, at 466.

[34] *Id.* at 468.

[35] *Id.* at 465.

[36] *Id.*

[37] *See generally* Committee on Federal Legislation, *Citizens' Standing To Sue in Federal Courts*, 34 Rec. A.B. City N.Y. 585 (1979).

[38] *See generally* 1 A. de Tocqueville, *supra* note 1, at 103, 106-07. Also note that the Court's doctrine of "constitutional avoidance"—by which it refrains from deciding constitutional questions where possible—is based in part upon "the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely." Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 72 (1961); *see also* Ashwander v. TVA, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring).

[39] U.S. Const. art. III, § 2. As the Supreme Court explained in Flast v. Cohen, 392 U.S. 83, 95 (1968):

> "In part those words ["cases" and "controversies"] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine."

The Court noted, for example, that no justiciable controversy is presented when parties seek an advisory opinion, and that the longstanding rule against such opinions implemented the separation of powers described by the Constitution and served to confine the judiciary to its proper role. *Id.* at 95.

[40] *The Federalist No. 78, supra* note 24, at 468-69.

[41] *Id. No. 79*, at 474.

[42] *Id. No. 81*, at 484.

[43] *Id.* at 485.

[44] *See, e.g., id. No. 78*, at 466; Redish & Woods, *supra* note 23; Tweed, *supra* note 28. State courts might not have power to prevent unconstitutional actions by the federal government. *See* Redish & Woods, *supra* note 23, at 49-50, 81-92.

[45] R. Berger, *Congress v. The Supreme Court* 337 (1969).

[46] U.S. Const. art. VI, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[47] *See* Ratner, *supra* note 2, at 160-61, 165 & n.41, 166-67, 184-85.

[48] *See, e.g., id.*; Eisenberg, *supra* note 2, at 505-07; Sedler, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. Pitt. L. Rev. 99, 113-14 (1958).

[49] C. Black, *Structure and Relationship in Constitutional Law* 74-76 (1969).

[50] O.W. Holmes, *Collected Legal Papers* 295 (1920).

[51] *The Federalist No. 22, supra* note 24, at 150:

> "A circumstance which crowns the defects of the Confederation remains . . . the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation."

[52] *Id. No. 80*, at 476.

[53] *Id. No. 22*, at 150.

[54] I. M. Farrand, *Records of the Constitutional Convention* 124 (1911) (emphasis added). At the Constitutional Convention, the principal debate over Article III was whether to create federal courts of general original jurisdiction, or whether the state courts should try all federal causes in the first instance with a right of appeal to the Supreme Court on federal questions; both sides acknowledged the necessity of Supreme Court appellate jurisdiction to review state court decisions on federal issues. Ratner, *supra* note 2, at 161-65 & nn.15-25 (citing the debates); Eisenberg, *supra* note 2, at 505, 508-10. This debate continued in the First Congress after the Constitution was ratified. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 53, 65-68, 123-25 (1923).

[55] Ch. 20, § 25, 1 Stat. 85.

[56] 28 U.S.C. § 1257 (1976).

[57] Ratner, *supra* note 2, at 184-85.

[58] Warren, *supra* note 54, at 65 & n.39.

[59] *Id.* at 67-68.

[60] Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888); *see, e.g.*, Ames v. Kansas, 111 U.S. 449, 463-64 (1883); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378-412 (1821).

[61] Ratner, *supra* note 2, at 166; *see id.* at 166-67 & n.49.

[62] 14 U.S. (1 Wheat.) 304 (1816).

[63] *Id.* at 347-48. In previous proceedings in the case, the Supreme Court had re-

versed a decision of the Virginia Court of Appeals and remanded the cause with instructions to enter judgment for the appellant. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). The Virginia court refused to obey the mandate, holding that the Supreme Court's appellate jurisdiction could not constitutionally extend to decisions by the courts of a sovereign state, but only to such inferior federal courts as Congress might establish under Article III. Hunter v. Martin, 18 Va. (4 Munf.) 1 (1814).

[64] 19 U.S. (6 Wheat.) 264 (1821).

[65] *Id.* at 416-18. *See also* Dodge v. Woolsey, 59 U.S. (18 How.) 331, 350-51, 355 (1855), in which the Supreme Court opined:

> "[T]he framers of the constitution, and the convention which ratified it, were fully aware of the necessity for . . . a department . . . to which was to be confided the final decision judicially of the powers of that instrument, the conformity of laws with it, which either congress or the legislatures of the States may enact, and to review the judgments of the State courts, in which a right is decided against, which has been claimed in virtue of the constitution . . . .
>
> "Without the supreme court, as it has been constitutionally and legislatively constituted, neither the constitution nor the laws of congress passed in pursuance of it . . . would be in practice or in fact the supreme law of the land . . . ."

[66] 62 U.S. (21 How.) 506 (1858).

[67] *Id.* at 517-18. Likewise, in Gordon v. United States, 117 U.S. 697, 700-01 (1858), the Supreme Court opined that

> "there was . . . an absolute necessity . . . that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers . . . . The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured."

[68] 319 U.S. 624, 638 (1943)

[69] 5 *The Writings of James Madison* 269 (Hunt ed. 1904), *quoted in* J. Choper, *Judicial Review and the National Political Process* 60-61 (1980).

[70] *See, e.g., The Federalist No. 79, supra* note 24; J. Choper, *supra* note 69, at 67-70; United States v. Will, 101 S. Ct. 471, 482-83 (1980).

[71] *See, e.g.*, note 33 *supra* and accompanying text (quoting Hamilton); J.Choper, *supra* note 69, at 60-128, 167-68; Eisenberg, *supra* note 2, at 506-07; Redish & Woods, *supra* note 23, at 76-79; Tweed, *supra* note 28, at 5; Warren, *supra* note 54, at 115 (quoting Madison).

[72] C. Hughes, *The Supreme Court of the United States* 236 (1927).

[73] F. Frankfurter, *Law and Politics* 52 (1939).

[74] Chambers v. Florida, 309 U.S. 227, 241 (1940), *quoted in* Kaufman, *supra* note 6, at 7.

[75] *E.g.*, Youngstown Co. v. Sawyer, 343 U.S. 579 (1952); Lynch v. United States, 292 U.S. 571 (1934); *see* Fink, *Undoing the High Court*, N.Y. Times, July 17, 1981, at A23.

[76] Representative Barney Frank (D.-Mass.) made a similar point while speaking at the American Bar Association convention in August 1981. *See* Taylor, *The Bar Weighs in as a Friend of the Courts*, N.Y. Times, Aug. 16, 1981, § 4, at 7.

[77] Freund, *supra* note 2, at 350; *see* Gompers v. United States, 233 U.S. 604, 610

(1914) (Holmes, J.).

[78] *See* Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006 (1965).

[79] Committee on Federal Legislation, *Federal Diversity Jurisdiction*, 33 Rec. A.B. City N.Y. 493, 500 (1978).

[80] The provision that the judicial power of the United States "shall be vested" in the Supreme Court and in such inferior federal courts as Congress may establish (art. III, § 1) would seem on its face to require that the entire judicial power (defined in art. III, § 2) be conferred upon the federal judiciary. Indeed, one early Supreme Court decision by Justice Story so opined. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-31 (1816) (Story, J.) (dicta). *See generally* Eisenberg, *supra* note 2, at 501-02 & nn.23-27. However, the Supreme Court later rejected this view. *E.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850).

[81] 28 U.S.C. § 1332 (1976).

[82] 28 U.S.C. § 1257 (1976).

[83] *Hart, supra* note 23, at 1365; Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53, 53-54 (1962); Ratner, *supra* note 2, at 183-84.

[84] Hart, *supra* note 23, at 1362-63 & *passim* (Professor Hart concludes that these dicta cannot be taken at face value); *cf.* Warren, *supra* note 54, at 51.

[85] *See* Brest, *supra* note 2, at 594; Eisenberg, *supra* note 2, at 517-20; Hart, *supra* note 23, at 1365, 1371-74.

[86] *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Van Alstyne, *supra* note 2, at 267-68; Note, *The Nixon Busing Bills and Congressional Power, supra* note 2, at 1547, 1556-57.

[87] *See* notes 40-43 *supra* and accompanying text.

[88] *See* Eisenberg, *supra* note 2, at 514-18. An attempt to define the legitimate scope of Congress' regulation of federal court jurisdiction in all cases is beyond the scope of this Report, which is concerned solely with Congress' authority to limit the courts' jurisdiction to hear constitutional claims. Congress' power to limit jurisdiction to hear claims that arise solely under congressional statute, and do not implicate constitutional rights, is probably much broader; indeed, denial of a judicial remedy to enforce rights that are claimed solely under a federal statute might be seen as a limitation of the substantive rights created by the statute. *Cf.* Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 42 (1918):

> "[F]or legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."

[89] Youngstown Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

[90] U.S. Const. art. III, § 2.

[91] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[92] Ratner, *supra* note 2, at 172-73 (citing authorities). Professor Ratner states:

> "The defeat of the amendment thus may reasonably be construed as a rejection by the Convention of plenary congressional control over the appellate jurisdiction of the Court and as indicating that the purpose of the clause was to authorize exceptions and regulations by Congress not incompatible with the essential constitutional functions of the Court."

*Id.* at 173.

[93] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[94] Youngstown Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring), quoted in text accompanying note 89 *supra*; *Legal Tender Case*, 110 U.S. 421, 439

(1884); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[95] *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 20 (2d ed. 1973) (footnotes omitted):

> "The important provision that the appellate jurisdiction should be subject to exceptions and regulations by Congress was contained in none of the plans [submitted to the Constitutional Convention]. It is foreshadowed in Randolph's draft for the Committee on Detail and then appears in a letter draft in Wilson's handwriting in substantially the form in which the Committee reported it. There was no discussion in the Committee."

[96] R. Berger, *supra* note 45, at 285-96; Merry, *supra* note 83, at 57-68; Warren, *supra* note 54, at 56, 61, 74-75, 78-79, 90, 94, 96-104, 112-115, 127. Article III, Section 2, grants the Supreme Court appellate jurisdiction in all cases within the federal judicial power "both as to Law and Fact"; this sentence continues with the Exceptions Clause.

[97] *The Federalist No. 81*, *supra* note 24, at 488. The issue was hotly debated because there were such varying practices in the states respecting review of trial court and jury factual determinations. R. Berger, *supra* note 45, at 286-89.

[98] R. Berger, *supra* note 45, at 289. The First Congress addressed this question in enacting the Judiciary Act of 1789. Warren, *supra* note 96. It also resolved the scope of review of jury findings in proposing the Seventh Amendment:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

[99] Hart, *supra* note 23, at 1364.

[100] *Id.* at 1365; *accord*, R. Berger, *supra* note 45, at 296; Brest, *supra* note 2, at 594; Merry, *supra* note 83, at 53-54, 56-67; Ratner, *supra* note 2, at 171-72. *Contra*, Van Alstyne, *supra* note 2, at 260; Wechsler, *supra* note 78, at 1005-06.

[101] Ratner, *supra* note 2, at 168-71.

[102] *See* authorities cited in note 83 *supra*.

[103] Colorado Central Mining Co. v. Turck, 150 U.S. 138, 141 (1893); American Constr. Co. v. Jacksonville Ry., 148 U.S. 372, 378 (1893); The Francis Wright, 105 U.S. 381, 385-86 (1881); United States v. Young, 94 U.S. 258, 259 (1876); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847); Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799); Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796).

[104] For an excellent analysis of the cases, *see* Ratner, *supra* note 2, at 173-83.

[105] 74 U.S. (7 Wall.) 506 (1869).

[106] 80 U.S. (13 Wall.) 128 (1872).

[107] For a thorough discussion of the case and its background, *see* Van Alstyne, *supra* note 2, *passim*.

[108] Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

[109] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

[110] Van Alstyne, *supra* note 2, at 233-35.

[111] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1868).

[112] Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44; *see* Van Alstyne, *supra* note 2, at 238-41.

[113] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869).

[114] Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2, at 1555; *cf.* Van Alstyne, *supra* note 2, at 239-40, 248 & n.72.

[115] Glidden Co. v. Zdanok, 370 U.S. 530, 605 & n.11 (1962) (Douglas, J., dissenting).

[116] *See* Hart, *supra* note 23, at 1364-65.

[117] Van Alstyne, *supra* note 2, at 249-54; *see Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 105 (1869).

[118] 74 U.S. (7 Wall.) at 515 (citation omitted; emphasis added). The "previously exercised" jurisdiction referred to was the Supreme Court's power to review by writ of certiorari habeas corpus cases commenced in the lower courts, and to issue original writs of habeas corpus in such cases, under the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81 (1789).

[119] 75 U.S. (8 Wall.) 85 (1869).

[120] *Id.* at 105-06; *see* Van Alstyne, *supra* note 2, at 252.

[121] 75 U.S. (8 Wall.) at 96-103; *see* Ratner, *supra* note 2, at 179.

[122] 80 U.S. (13 Wall.) 128 (1872).

[123] *Id.* at 146.

[124] *Id.* at 146-47.

[125] U.S. Const. art. III, § 1.

[126] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330-31 (1816) (Story, J.) (dicta).

[127] *See also* J. Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 246 (1971).

[128] *See* note 80 *supra* and accompanying text.

[129] *See* Eisenberg, *supra* note 2, at 502-04; Redish & Woods, *supra* note 23, at 56-61.

[130] *See, e.g.*, Eisenberg, *supra* note 2, at 500-04; Ratner, *supra* note 2, at 158; Redish & Woods, *supra* note 23, at 46-47.

[131] Eisenberg, *supra* note 2, *passim*.

[132] Redish & Woods, *supra* note 23, *passim*.

[133] 407 U.S. 225 (1972).

[134] *Id.* at 239.

[135] *Id.* at 242.

[136] American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 166 (1969).

[137] U.S. Const. art. III, § 1; see text accompanying notes 27-28, 33, 70 *supra*.

[138] C. McGowan, *The Organization of Judicial Power in the United States* 16 (1967).

[139] *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971) (reviewing school desgregation remedies):

> "This Court, in [Brown v. Board of Educ., 347 U.S. 483 (1954)], appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience."

*See also* Mapp v. Ohio, 367 U.S. 643, 651-53 (1961) (applying the federal exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914), to state criminal trials).

[140] Craven, *Integrating the Desegregation Vocabulary — Brown Rides North, Maybe*, 73 W. Va. L. Rev. 1, 3 (1970) (footnotes omitted).

[141] U.S. Const. art. I, § 8, cl. 3; *see, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-97 (1824); Katzenbach v. McClung, 379 U.S. 294, 303-05 (1964).

[142] Hart, *supra* note 23, at 1371-72; Van Alstyne, *supra* note 2, at 263-64; *see* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936); Feinberg v. FDIC, 522 F.2d 1335, 1342 (D.C. Cir. 1975); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); Faulkner v. Clifford, 289 F. Supp.

895, 898-901 (E.D.N.Y. 1968), *appeal dismissed*, 393 U.S. 1046 (1969).

[143] Williams v. Rhodes, 393 U.S. 23, 29 (1968).

[144] Feinberg v. FDIC, 522 F.2d 1335, 1341-42 (D.C. Cir. 1975); International Tel. & Tel. Corp. v. Alexander, 396 F. Supp. 1150, 1163-64 & n.31 (D. Del. 1975); *cf.* Cortright v. Resor, 325 F. Supp. 797, 808-10 (E.D.N.Y. 1971); Hart, *supra* note 23, at 1387.

[145] Oestereich v. Selective Service Bd., 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring) (citations omitted):

> "It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims."

*See* Bob Jones University v. Simon, 416 U.S. 725, 746 (1974); Yakus v. United States, 321 U.S. 414, 434, 441-44 (1944); Crowell v. Benson, 285 U.S. 22, 58-61 (1932); Feinberg v. FDIC, 522 F.2d 1335, 1337-42 (D.C. Cir. 1975); International Tel. & Tel. Corp. v. Alexander, 396 F. Supp. 1150, 1168 (D. Del. 1975); Faulkner v. Clifford, 289 F. Supp. 895, 898-901 (E.D.N.Y. 1968), *appeal dismissed*, 393 U.S. 1046 (1969).

[146] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936); Feinberg v. FDIC, 522 F.2d 1335, 1342 (D.C. Cir. 1975); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[147] *See* Bell v. Hood, 327 U.S. 678, 684 (1946); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803); *cf.* Cortright v. Resor, 325 F. Supp. 797, 809-10 (E.D.N.Y. 1971).

[148] 50 U.S.C. App. §460(b)(3)(1964).

[149] Oestereich v. Selective Service Bd., 393 U.S. 233 (1968).

[150] 12 U.S.C. §1818(i)(1964).

[151] Feinberg v. FDIC, 522 F.2d 1335 (D.C. Cir. 1975).

[152] *See* cases cited notes 144-46 *supra*.

[153] Oestereich v. Selective Service Bd., 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring); *see also* Yakus v. United States, 321 U.S. 414, 434, 441-44 (1944).

[154] Hart, *supra* note 23, at 1371-83; Wechsler, *supra* note 78, at 1006; *compare* Lockerty v. Phillips, 319 U.S. 182 (1943), *with* Yakus v. United States, 321 U.S. 414 (1944).

[155] Standards developed under the Fourteenth Amendment Equal Protection Clause are applicable to the federal government under the Fifth Amendment Due Process Clause. *E.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[156] Van Alstyne, *supra* note 2, at 263-64; *cf.* Eisenberg, *supra* note 2, at 516; Sedler, *supra* note 48.

[157] Dunn v. Blumstein, 405 U.S. 330, 339 (1972) (first emphasis added); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (first emphasis added).

Most of the bills under consideration here would be subject to strict scrutiny under the "compelling governmental interest" test. The bills relating to public prayer (Part IA above) implicate the religious freedoms guaranteed by the First Amendment and would therefore be subject to such scrutiny. *See* Sherbert v. Verner, 374 U.S. 398, 403-06 (1963). Regarding the abortion bills (Part IB above), the Supreme Court has held that a woman's right to an abortion in the first trimester of pregnancy is a fundamental constitutional right that may be limited only where necessary to promote a compelling governmental interest. Roe v. Wade, 410 U.S. 113, 154-55 (1973). The bills relating to school desegregation (Part IC above) would abridge remedies for segregation in the public schools based on race, a constitutionally suspect classification that calls into play strict scrutiny under the compelling governmental interest test. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-93 (1964); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). *But cf.* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-66 (1977) (facially neutral classification having racially discriminatory impact will be subject to strict scrutiny only if motivated by racial discrimination). Strict scrutiny under the compelling governmental interest test has also been applied to classifications affecting other fundamental rights. *E.g.*, Police Dep't v. Mosley, 408 U.S. 92, 97-99 (1972) (freedom of speech); Dunn v. Blumstein, 405 U.S. 330, 338-39 (1972) (right to travel); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 670 (1966) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate).

Sex-based classification, the subject of the pending armed forces bills (Part ID above), is reviewed under a different test: whether the classification is substantially related to an important government interest. *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[158] *E.g.*, McDonald v. Board of Election, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Railway Express v. New York, 336 U.S. 106, 109-10 (1949).

[159] Eisenberg, *supra* note 2, at 514-17; Van Alstyne, *supra* note 2, at 263-64. *See generally* text accompanying note 88 *supra*.

[160] Eisenberg, *supra* note 2, at 517-20; Hart, *supra* note 23, at 1371; Van Alstyne, *supra* note 2, at 267-68; Note, *The Nixon Busing Bills and Congressional Power*, *supra* note 2, at 1547; *see* United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1872) (impermissible for Congress to withhold jurisdiction "as a means to an end").

[161] *See* Hart, *supra* note 23, at 1371-72; *cf.* Cortright v. Resor, 325 F. Supp. 797, 808-10 (E.D.N.Y. 1971).

[162] *Compare* Boddie v. Connecticut, 401 U.S. 371, 376-78 (1971) (Due Process Clause does not permit denying persons access to judicial remedies that affect fundamental rights), *with* Shapiro v. Thompson, 394 U.S. 618, 631, 634 (1969) (Equal Protection Clause does not permit classification that has purpose and effect of impairing fundamental rights). *See also* United States v. Kras, 409 U.S. 434, 446-47 (1973).

[163] 289 F. Supp. 895 (E.D.N.Y. 1968), *appeal dismissed*, 393 U.S. 1046 (1969).

[164] 50 U.S.C. App. § 460(b)(3)(1964).

[165] 289 F. Supp. at 900-01.

[166] Nixon v. Administrator of General Services, 433 U.S. 425, 506 (1977) (Burger, C.J., dissenting).

[167] Kaufman, *supra* note 2, at 56, 96.

[168] *See* notes 40-43 *supra* and accompanying text.

[169] U.S. Const. art. I, § 3; *id.* art. II, § 4. *See generally* Committee on Federal Legislation, *Precis of Report on the Removal of Federal Judges Other Than by Impeachment*, 32 Rec. A.B. City N.Y. 239 (1977); *see also*, Kaufman, *Chilling Judicial Independence*, 34 Rec. A.B. City N.Y. 157 (1979).

[170] S. Rep. No. 711, 75th Cong., 1st Sess. 13-14 (1937).

## PART 2.—NEWSPAPER AND MAGAZINE ARTICLES

[From the National Review, September 19, 1980]

### GOVERNMENT BY JUDICIARY—EX PARTE McCARDLE

(By Anthony Tortora [1])

As the election draws near, it is useful to be reminded not only of what is desirble in politics, but also of what is possible. Too much of what is desirable has not even been seriously attempted, because of the belief that it is impossible of achievement. The recent adoption by the Republican Platform Committee of a resolution to prohibit busing for purposes of school integration is a good example; it is a pure velleity if, simultaneously, one does not address how this policy is to be implemented against the Supreme Court's (sometimes) adamantine insistence that such busing is constitutionally obligatory.

Similarly, the gathering support for tuition tax credits may, in due course, founder on the shoals of a Court decision that they violate the "separation of church and state." That such a ruling would be a preposterous misreading of the First Amendment's reference to "establishment of religion" doesn't give us any less reason to predict it. It would just represent (to paraphrase Raoul Berger's indictment in Government by Judiciary) "another of the usurpations that bestrew the path of the Court."

These matters have been almost entirely undiscussed during the campaign, along with, as the *Fullilove* decision perhaps reminded us, "affirmative action" in all its varied manifestations. But they must be mentioned, soon or late, for they will not go away, and it is intolerable that present policies should continue unremedied, because they make manifest what is now unequivocally true: namely, that the United States Government—notwithstanding its sanctimony toward South Africa and pre-Mugabe Rhodesia—is the largest purveyor of racial discrimination in the world today. And this obsession with race, and sex, is so pervasive that we've become accustomed to hearing matters on which race and sex only incidentally impinge aggregated with those to which these matters are central. Thus, for example, the tendentious treatment of the tuition tax credit issue as if it were a question which naturally divides black from white.

In any event these issues certainly are categorically distinct for the purpose of this article. The *Weber* and *Fullilove* cases, and affirmative action generally, are (legally) comparatively simple matters. The Court has never held that it is constitutionally required to discriminate against white people on the basis of race. The very statement of the proposition makes this evident, even though we continue to be afflicted by a Court some of whose members' grasp of the Constitution is so fragile one wonders if someday they might not reach that conclusion.

*Weber* was specifically decided on the basis of the 1965 Civil Rights Act, and the Court held, in effect, that Congress could permissibly legislate racial preferences. That this decision perversely stood on its head the manifest intent of the 1964 Act has elsewhere been well documented, and I doubt one could improve on Justice Rehnquist's devastating dissent to this effect. The point, however—of which even the Washington Post took note in its morning-after editorial—is that if Congress did not like the holding in the case it could reverse it.[2] That Congress has not done so, or otherwise seen fit to reverse the volumes of regulations and edicts imposing racial and/or sexual quotas, by which the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) have re-ordered our lives, reflects congressional pusillanimity, and certainly not any insuperable legal obstacles. *Fullilove*, in this context, merely provides a gloss on *Weber* by iterating Congress authority to legislate racial preferences.

With respect to busing, the situation is rather different, both legally and socially. The social question is, in my view, immeasurably more serious. What other society has ever offered up its children as point-men in a radical, and radically dangerous, social experiment? Has any sociologist or historian had the courage to break the mold of fashion and attempt to count the casualties—physical, emotional, educational—which have resulted from this experimentation?

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[1] Mr. Tortora who lives in Baltimore, works for the Department of Labor in Washington, D.C.

[2] The ability of Congress to overturn a Court decision made on statutory grounds is a legal commonplace which no competent lawyer would attempt to deny. It occurs in other, less politically volatile contexts without comment; consider, for example, Senator Kennedy's pending legislation (S-300) to overturn the Court's holding in the *Illinois Brick* antitrust case.

But on the legal point, which is the purpose of this article, there has been general despair. It has generally been believed that because *Brown* v. *Board of Education* was decided on constitutional rather than statutory grounds, and because decisions requiring busing were largely derivative (from *Brown*), therefore no remedial approach save that of a constitutional amendment is possible. The defeat of Representative Ronald Mottl's effort to get the busing amendment through Congress has seemed to sound the death knell for these attempts at revision. Since most people believe that there is no redress short of an (apparently unpassable) constitutional amendment, the feeling is quite general that there is nothing legally to be done.

It is important to disabuse ourselves of this notion which paralyzes our will to act. Amendments are unnecessary and are, moreover, subject to objections which are not raised with regard to statutory legislation. Further, they are unwieldy tools which are too slow and cumbrous to deal with a situation which is in urgent need of reform. Much simpler would be federal legislation prohibiting busing in order to achieve "racial balance," combined with legislation which would remove the issue from the jurisdiction of the courts.

The constitutional authority for this procedure is manifest, and I am undecided whether its disuse stems from congressional timidity or from ignorance. Forced to guess, I personally would be inclined to believe the latter. Let's start with the basics: the Constitution itself, which is, strictly speaking, both the beginning and the end of the argument.

Article III deals with the judicial power of the United States and divides the jurisdiction of the Supreme Court (the only court specifically mentioned, the establishment of the inferior federal courts being left to the discretion of Congress) into "original Jurisdiction" and "appellate Jurisdiction." The Court has original jurisdiction "in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party." Article III, Section 2 goes on to say that "In all other cases . . . the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

To put it another way, the Supreme Court addresses issues at the sufferance of Congress, except in those cases in which it has constitutionally conferred "original Jurisdiction." It is too clear to require elaboration that the quota and busing questions, and also the proposed tax credit legislation, fall outside the class of cases enumereated under the Court's original jurisdiction.

This provision of the constitution has not been invoked for some time, and its disuse has a way of making it appear novel. But it is not, and among the cognoscenti its existence is acknowledged as a commonplace. Richard Morris, for example, in the 1961 edition of his Encyclopedia of American History, remarks matter-of-factly that "In February 1868 the Court agreed to consider *ex parte McCardle.* Fearing that a review of this case might invalidate Reconstruction measures, Congress deprived the Court of jurisdiction." Morris evidently felt no need to elaborate on that which he took as a given, but the very general unawareness of the provision nowadays virtually compels a fuller restatement of its implications. This undesirable necessity calls to mind Orwell's observation that we have sunk so low that "the first duty of intelligent men is to state the obvious."

William Archibald Dunning, writing to the same effect as Morris, comments, in his text Reconstruction: Political and Economic: "From this trying predicament [i.e., the anticipated Supreme Court reversal of a Reconstruction statute] the radicals in Congress extricated the Court by a hasty repeal of the legislation which gave jurisdiction over the case; and the Chief Justice, whose dislike of military judicature was well-known, relinquished with some regret so perfect an opportunity to damn it, but saved as he could the dignity of the Court by the resounding platitude: 'Judicial duty is not less fully performed by declining ungranted jurisdiction than by exercising firmly that which the Constitution and the laws confer.' "

Also, Professors Alpheus Mason and William Beaney state, in their monographic American Constitutional Law: "The Supreme Court has appellate jurisdiction in respect to both law and fact in all other cases, but subject to such exceptions and regulations as Congress shall make (Article III, Sec. 2, Cl. 2). By virtue of this clause and of its power over the jurisdiction of inferior federal courts, Congress has plenary power over the appellate jurisdiction of the Supreme Court. It could thus deprive that Court of all such jurisdiction and make final the decisions of the inferior courts. An extreme example occurred in 1868 when Congress, fearing that the Court would invalidate the Reconstruction Acts, hastily withdrew the Court's jurisdiction under the Habeas Corpus Act of 1867. The Court thus became powerless to pass on a case in which argument had been heard."

Numerous citations to the same effect could easily be made. But for those who have become accustomed to an acquiescent legislature, the detail of this case is especially instructive in displaying the ease and assurance with which Congress formerly asserted its supremacy over the Court. There are of course other instances where Congress limited the scope of the Court's authority, but none I think with such didactic effect as in *McCardle*, where Congress reached out to interpose its will not only on a case which was sub judice, but on a matter (writs of habeas corpus, the so-called "Great Writ") which has constitutional protection (vide Article I, Section 9). Surely it is clear beyond cavil that a Congress which can be the final arbiter on a matter which is an integral and explicit part of the Constitution has more than sufficient authority to mandate the handling of issues which have been given constitutional import by a kind of judicial forced march of the Fourteenth Amendment.

The *McCardle* story properly begins with an act to amend the Judiciary Act of 1789, by which amendment, on February 5, 1867, Congress expanded the authority of the courts by providing that the courts of the United States "shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violence of the Constitution, or of any treaty or law of the United States" (14 Statutes at Large 385). The same Act further provided that it should "not apply to any person who is or may be held in the custody of the military authorities of the United States, charged with any military offense."

The problem which eventually gave us the *McCardle* case arose as a result of action by the governor of the military region in which McCardle resided. The governor imprisioned McCardle, a Confederate journalist given to invective against the military administration of the South under the Reconstruction statutes. Suit was brought on McCardle's behalf that a writ of habeas corpus be issued. Under the 1867 amendment to the Judiciary Act, the case was enabled to work its way to the Supreme Court, where argument was heard. This was entirely proper, absent a congressional prohibition of judicial review; and it was clear that the Act's exemption of persons incarcerated by the military would be the focus of the legal assault on the Act. First, however, the Court heard arguments as to its jurisdiction, and it ruled that indeed it might hear and rule on McCardle's appeal.

Congress, understandably, anticipated that the Court would rule in McCardle's favor; as has been noted, the Court's lack of sympathy for the military administration of the South was widely known. Accordingly, Congress passed the repealing act which removed the case from the Court's jurisdiction. Chief Justice Chase's opinion in the case displayed a laudable deference to both the spirit and the letter of the Constitution; he showed reluctance even to speak to an issue on which jurisdiction had been removed, saying, "The first question necessarily is that of jurisdiction; for, if the Act of March 1868 takes away the jurisdiction defined by the Act of February 1867, it is useless, if not improper, to enter into any discussion of other questions." And further, "Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause."

So admirable a fidelity to the Constitution has not been consistently shown by recent courts, and it would be idle not to come to grips with the question which logically springs to mind: What if the Court decided otherwise and asserted its right to rule even where jurisdiction had not been granted? The question is not entirely speculative. In his History of the Supreme Court of the United States, Charles Fairman reminds us that when Justice Harlan in 1962 mentioned the *McCardle* case, "there was a nervous reaction within the Court. Justice Douglas saw 'great mischief'—'There is a serious question whether the *McCardle* case would command a majority view today.' "

This and this alone will determine who prevails, and not any arcane argument about legalities. But for those who seek guidance as to how it should be dealt with if the Court ever so defied Congress, there is no better guidance than that provided by Alexander Hamilton in the 81st Federalist:

> It may in the last place be observed, that the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support it usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department.

This is alone a complete security. There never can be any danger that the judges, by a series of deliberate usurptions on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumpton by degrading them from their stations. While this ought to remove all apprehensions on the subject it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.

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[From the Economist, June 6, 1981]

## AMERICAN SURVEY—HOW SUPREME IS THE SUPREME COURT?

"A radical and dangerously unprincipled attack upon the foundations of our constitutionalism". This was the verdict of Mr. Archibald Cox, the former solicitor-general and Watergate prosecutor, on the anti-abortion bill that is now before congress. Mr. Cox was not responding to the emotional sides of the issue, to do with a woman's privacy or the moment when life begins, but to the bill's effect on the constitutional balance of powers between congress, the executive and the courts. The Helms-Hyde bill would allow states to outlaw abortions, overturning the 1973 Supreme Court decision which made them legal, and would then bar federal district or appellate courts from hearing cases arising from the new state laws. In effect, as one constitutional lawyer has pointed out, it would allow each state to decide for itself the scope of its authority under the constitution.

There are at present four bills in the senate and 23 in the house of represenatives which seek to curb the powers of the federal judiciary. Most are intended to keep the so-called "moral" or "social" issues—principally abortion, school prayer and school desegregation—within state purview and outside the scope of any unifying federal decision, such as the Supreme Court would provide. The conservatives who now dominate the senate committees argue that the role of the judiciary has been unjustifiably enlarged; that the Supreme Court is not the sole interpreter of the constitution and that, as Senator Orrin Hatch of Utah expressed it in an article in the Washington Post: "When the policeman violates the law, a higher authority must undertake to protect freedom". By "higher authority", Mr. Hatch says he means the constitution; but it is clear that this is the constitution as interpreted by congress, and especially by those factions of it which have taken unkindly to Supreme Court decisions of the past 20 years.

The tussel for political power between congress and the Supreme Court is far from new. Their respective power are spelt out in the constitution, but at no point is the Supreme Court given the authority it has gradually acquired for itself of being the supreme arbiter of constitutional right and wrong. According to article III, section 2:

"The Supreme Court shall have appellate jurisdiction, both as to Law, and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

It has original jurisdiction only in cases affecting ambassadors, public servants and cases where a state, or the nation, is a party. All lower federal courts are made subject to congress, which traditionally determines the cases they hear and may, if it chooses, even abolish them.

The Supreme Court, however, is much less easily brought to account by congress, for the simple reason that it was never meant to be a body subject to political whims or pressure from an electorate. While this has sometimes meant that the court has dragged behind the times, it has also allowed it to be radical—on issues such as individual rights—when congress is being reactionary. The present struggle over the court's right to hear cases touching abortion and the schools is in a long tradition in which congress tries to curb the court if its decisions impinge too much on public policy. When the court struck down state anti-subversion laws in the 1950s or, in the *Miranda* case of 1966, defined the rights of prisoners undergoing interrogation, dozens of bills to restrain it came before congress. None was passed, but there was never any lack of provocation from the activist Warren court nor, in the eyes of conservatives, from the Burger court that succeeded it.

In only one instance, that of *McCardle* in 1869, has the Supreme Court ever allowed its power to be trimmed by congress. This was in a case about the power of Reconstruction courts, an aberration which has never set a practical precedent. Even the bills that are now proposed, limiting the court's power to make authoritative federal law, would not overrule decisions already made. But they would remove the authority of the lower courts to enforce them, as well as overturning the Supreme Court's position as a uniform guarantor of constitutional freedoms.

The legislative route towards curbing the Supreme Court is being chosen because it is relatively quick and easy. It requires a simple majority in both houses and the signature of the president. In contrast, a constitutional amendment to overturn a Supreme Court decision—such as the one requested by 32 states after the 1963 one-man one-vote ruling—requires a two-thirds majority in each house and ratification by three quarters of the states.

The court, however, may not be so vulnerable to attack-by-bill as conservatives suppose. It still has power to review all legislation passed by congress, a power even Senator Hyde does not think it can be denied. Besides, the court is no stranger to these campaigns. Its practice at most stages in its history has been to beat a retreat—occasionally permanent, more often merely tactical—in the face of threats from the legislature. In this way it has, so far, managed to preserve it authority to deal with every issue brought before it without regard for the sensitivities of congressmen.

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[From the Washington Post, April 16, 1981]

## THE COURT MUST STAY SUPREME

(By Robert W. Kastenmeier[1])

Congress and the nation are now facing an attack on the vital role and nature of the Supreme Court the likes of which has not been seen since FDR's court-packing plan. The current attack is even more serious because it strikes at the independence and integrity of the Supreme Court's most basic function—to review the constitutionality of state laws and actions. This current assult is embodied in 13 bills pending in the House, which are designed to eliminate the jurisdiction of the federal courts to consider any cases that relate to state laws on prayer in public schools, abortion or school desegregation plans.

Bascially, the proponents of these bills are saying, "We don't like the way the federal judiciary has resolved these issues, so we're going to take away their power to make such rulings." This attitude is particularly pernicious because it is focused on three of our most precious liberties—the separation of religion and the state, the right to equal public education free of racial bias and a woman's right to personal liberty and privacy. The Supreme Court has been on the front lines on these issues.

Whatever differences one may have with the court, its role, since the enactment of the Constitution, has been to be the final arbiter of fundamental questions, the articulator of rights, the last best hope for the maintenance of our freedoms. It has served us well. To now cut away at the court's authority cannot be in anyone's interest.

The basic questions facing the Judiciary Committee are: Does Congress have the power to withdraw federal court jurisdiction over constitutional rights cases? And, if so are the good policy reasons to do so? I believe that the answer to both of these questions is no.

At least two arguments suggest that the legislation is constitutionally flawed. First, there is the "essential role" argument, which asserts that Congress does indeed have power to regulate the court's jurisdiction, but not to the degree that such regulation impinges on the essential role of the court to maintain the supremacy of the Constitution's review of the constitutionality of state laws and actions. Of importance is a relevant due process/equal protection issue. An admitted premise of this legislation is that by relying on the state courts to determine final constitutional law, persons who are similarly situated and are asserting the same constitutional right may well be treated differently in different jurisdictions, violating the tenet of equal protection under the law. The Supreme Court would, for the first time, have no authority to rectify conflicting state court judgments.

There are also policy objections to the legislation. First, the law is not a static text, but an evolving set of principles, ideas and judgments. An end of Supreme Court jurisdiction for any of these type of cases would freeze federal constitutional law in the area eliminating the possibility of aggrieved citizen's seeking further development of the law. To cut off a hearing of important issues cannot be a reasonable public policy goal.

Also, Congress must not offend or jeopardize the legitimate prerogatives of the other two equal branches of government. Chilling the ability of the federal courts to deal with constitutional questions suggests that the judicial branch is not competent to consider such questions.

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[1] The writer is a Democratic congressman from Wisconsin and member of the House Judiciary Committee.

Further, as the Carter Justice Department suggested last year, this legislation would run afoul of the public interest in affording a definitive and nationwide resolution of issues of constitutional magnitude.

It is no doubt healthful to review the nature and role of our nation's institutions. However, to attempt to emasculate the vital function of an institution as fundamental to our liberty as the federal judiciary can have only disastrous consequeces.

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[From the Washington Post]

[By Orrin G. Hatch [1]]

### THE CONSTITUTION, NOT THE COURT, IS SUPREME

Rep. Robert W. Kastenmeier (D-Wis.) contended that federal courts must remain supreme ["Perspectives," April 16]. His purpose for writing was to bolster his viewpoint that the Supreme Court is immune from congressional review. On the contrary, the Constitution must remain supreme. That inspired document specifically obligates Congress to check the judiciary when it steps beyond constitutional limits, just as the executive branch can use the veto to prevent congressional excesses. The majesty of the constitutional framework is that no branch is permitted to become supreme.

The drafters of the Constitution carefully composed Article III to place with Congress the responsibility to ensure that personal liberties are not endangered by an errant or arrogant judiciary. Section 2 lists the kinds of cases that the Supreme Court has the exclusive right to decide and then proceeds: "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, with such exceptions, and under such regulations as the Congress shall make."

With this language, the supreme Constitution charged Congress to regulate which cases the federal courts could hear on appeal from state courts. A legislative decision to make an exception in federal court appellent jurisdiction would give effect to the last article of the Bill of Rights, which reserves to the states and the people all matters not specifically delegated by the Constitution to the national government. Disputes would be settled by more accountable state and local decisionmakers rather than by national mandate.

Even Alexander Hamilton, known for his predisposition to favor centralized governance, reassured those who feared the potential reach of the federal judiciary by affirming that "the national legislature will have ample authority to make such exceptions and prescribe such regulations as will be calculated to obviate or remore these inconveniences." In Hamilton's estimation, a mere "inconvenience" would warrant a use of the specific constitutional check on the federal judiciary.

Substanitial groups who feel that the Supreme Court has abridged their rights are now petitioning Congress to recognize its constitutional role. They contend that, under the guise of interpretation, the Supreme Court has been amending the Constitution to jeopardize their rights. For instance, a single amendment (the 14th) of the Constitution has been stretched by the court into a number of controversial decisions. That single amendment has been employed to wrest from states and localities the decision of which school a child should attend, to permit programs favoring one race over another and to reverse more than 150 years of exclusive state discretion over apportionment of congressional districts. On occasion, the tribunal has not even bothered to interpret the Constitution itself, but only its penumbrae, to declare that; children are not persons before birth. Moreover, only a constitutional amendment by the prescribed Article V method would be sufficient to alter these doctrines promulgated by five out of nine judges. Fortunately, the approval of two-thirds of Congress and three-fourths of the states is not the only way to cause five judges to reconsider their actions.

In weighing whether to employ its authority to protect individual rights, Congress need not rely solely on these errant opinions.

On one occasion, the court branded a course of conduct it had pursued for nearly a century "an unconstitutional assumption of power by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." If the court, by its own admission, had unconstitutionally assumed authority for almost 100 years, Congress is justified in asking what it might not have yet confessed.

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[1] The writer is a Republican senator from Utah.

When Congress did withdraw appellate jurisdiction, the Supreme Court itself, acknowledged Congress' authority by immediately dismissing the questioned case. This was the famous ex parte *McCardle* case concerning a *habeas corpus* petition following the Civil War. The court stated conclusively: "We are not at liberty to inquire into the motive of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this court is given by express words." The Supreme Court itself would seem to take issue with Rep. Kastenmeier's reading of the exceptions clause.

Before writing out of the Constitution this check on federal court supremacy, the congressman should recall that the Supreme Court once ruled that a black man is not a person (similar to the ruling about unborn children) and could be regarded as property. More recently, the court decided that Japanese Americans could be incarcerated during World War II, simply on the basis of their national origin. If a future court wanted to return to these precedents, we would all be more secure knowing that Congress could halt the legal abrogation of rights.

The federal judiciary has been courting constitutional disaster by reading its own predilections into the nation's foundational document. The Supreme Court is the body charged with policing the bounds drawn by the Constitution. When the policeman violates the law, a higher authority must undertake to protect freedoms. The Constitution is that higher authority and has outlined the means to prevent overreaching. Jefferson provided the most graphic expression for this dilemma: "It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to rust with power. . .In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

The Constitution is supreme, not the court. We should all be granted that the Constitution includes checks to unsure that individual liberties do not fall prey to any single ambitious branch of government.

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## CONGRESS VERSUS THE COURT

(By Irving R. Kaufman)[1]

*(For Washington's new conservatives, the power of the Federal courts is an obstacle in the path of social change. Congress currently has before it more than 30 pieces of legislation aimed at taking that power away.)*

The first Monday in October, the commencement of the new Supreme Court term, is normally one of the more exciting dates on Washington's calendar. The long summer recess over, the nine Justice don their black robes and enter the marble and oak courtroom where they will ponder questions of truth and justice. This year, however, Oct. 5 will also be a time of no little concern for these esteemed jurists—as it should be for us all. The reason: The role of the High Court as counterbalance to the legislative and executive branches of government—a fundamental pillar of the American system—is under attack. Congress currently has before it more than 30 bills designed to sharply restrict the authority of the Federal judiciary and limit its power to interpret the Constitution.

These bills have been introduced by members of Congress's new conservative coalition, individuals who have been profoundly disturbed by many of the decisions the Supreme Court has made over the last two decades. For example, the Court has forbidden mandatory prayer in public schools, upheld a woman's right to abortion during the first three months of pregnancy, and characterized busing as the only constitutionally adequate remedy in some instances of racial imbalance in public schools. These decisions, all formed on the basis of constitutional principle alone—undoubtedly appear as obstacles to the social changes the new legislative coalition intends to make in this country now that the political pendulum is swinging in its direction. The way the coalition proposed to overcome these obstacles threatens not only a number of individual liberties, but also the very independence of the Federal courts, an independence that has safeguarded the rights of American citizens for nearly 200 years.

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[1] Irving R. Kaufman is a judge of the United States Court of Appeals for the Second Circuit.

The current legislative outlook is ominous. A subcommittee of the Senate Judiciary Committee has already approved a bill that would forbid the lower Federal courts to entertain challenges to state antiabortion legislation (even legislation that defined abortion as muder). In the last Congress, the Senate easily passed a proposal to withdraw lower Federal court jurisdiction in school-prayer cases. A discharge petition to move the bill from the House Judiciary Committee to the floor failed by only 32 votes. The bill has been reintroduced and its chances for passage are rated better in this year's Congress. Other bills which would take from the Supreme Court the power to revise state and lower Federal court decisions in school prayer, abortion and busing cases, are now wending their way through the Senate-House Judiciary Committees.

Legal experts from all sections of the political spectrum have begun stepping forward to denounce these proposals. The American Bar Association calls them a danger to the fundamental system of checks and balances. And Prof. Laurence H. Tribe, of the Harvard Law School, has gone so far as to characterize one of the bills as "too palpably unconstitutional to permit reasonable persons to argue the contrary." Still, the possibility that some of these bills may be enacted into law cannot be dismissed. If that should happen, the Supreme Court would either have to accept the Congress's mandate or adjudicate the constitutionality of the laws. If the Supreme Court then decided that the laws were, indeed, unconstitutional, it would be up to Congress either to back down or to permanently reduce the Court's power through constitutional amendment.

Such dilemmas have come close to occurring in the past. Today, it is the conservative wing that is attempting to circumscribe the Court's historical role. At other times in the past, the attack against the Court has been led by liberal reformers—while conservatives stood as sentinels guarding the sanctity of the Constitution. In the early 20th century, the Court struck down many pieces of legislation that sought to promote social change, including laws regulating child labor, setting minimum wages and maximum hours, forbidding the use of injunctions in labor disputes, and providing compensation for accident and illness. In response, liberals, and progressives led by Robert M. La Follette, attacked not only the concept of judicial review but the judges themselves. Statutes were introduced in Congress to require the votes of at least six justices to invalidate legislation, and some Congressmen supported constitutional amendments that would have mandated the popular election and recall of Federal judges.

Some years later, after the Supreme Court invalidated much New Deal legislation, President Roosevelt proposed a bill that would have allowed him to increase the Court's membership. Had that bill passed, Roosevelt would have been able to "pack" the Court with political allies, insuring that it would always decide as he saw fit. Fortunately, that plan died in the Senate Judiciary Committee.

Efforts to curb the courts have, if anything, become more frequent in recent years, and they have been proposed by politicians of almost all political stripes. After the Supreme Court's 1954 decision in *Brown* v. *Board of Education,* which declared an end to the purposeful segregation of public schools, a number of bills were introduced in Congress proposing to remove all Federal court jurisdiction in desegregation cases. At about the same time, the call for popular election of Federal judges was renewed. Later, in 1958, at the height of the cold war, serious and widespread support gathered for a bill that would have overturned Supreme Court decisions guaranteeing First Amendment freedoms to political dissidents by removing appellate jurisdiction in cases involving alleged subversive activity. And in 1964, the House of Representatives (but not the Senate) passed a bill that would have deprived the Supreme Court and the lower Federal courts of the power to hear cases regarding enforcement of the Court's new rule of one-man, one-vote for apportionment of state legislatures, a rule that was intended to redress inequities in voting strength caused by racial animus. The reapportionment decisions spurred a furious attack on the Court led by proponents of states' rights, some of whom went so far as to propose that a "Court of the Union," composed of the Chief Justices of all the states, be established to review the decisions of the Supreme Court.

All the bills under consideration this year invoke the concept of jurisdiction, the basic authority of a tribunal to decide a case. Sponsors of the bills cite Article III of the Constitution, which assigns to Congress the power to define and regulate the jurisdiction of all Federal courts including the Supreme Court. Using this power, the Congress has, for example, denied Federal judicial authority in some cases involving lawsuits for less than $10,000. No one questions the legitimacy of that restriction. So why, the sponsors ask, can Congress not also declare, as one bill does, that "the Supreme Court shall not have jurisdiction to review * * * any case arising out of any State statute, ordinance, rule or regulation * * * which relates to abortion?" The answer is not simple. It rest on an understanding of the scope of Congress's authority over the jurisdiction of the Federal courts, which, in turn, depends on an understanding of the Constitution and the role the Constitution mandates that the Federal courts play in the American system.

The framers and early expositors of the Constitution did not fear the power of the courts. With no innate authority either to enforce its own judgments or to control the purse strings, the judiciary was expected to be the weakest of the three branches of government. It was rather the legislative branch that the framers felt a need to restrain. Steeped in English parliamentary history, they know the dangers of legislative tyranny. James Madison, the principal architect of the Constitution, observed: "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

The framers set up the Federal court system as one means of checking the Congress. Using the power of judicial review, the courts would invalidate any leglislative acts that were inconsistent with the strictures of the Constitution. The theory was, and still is, that Congress should exercise only a delegated authority, derived from the people. The Constitution, in contrast, was intended to represent the actual embodiment of the people's fundamental and supreme will. Thus, when presented with a case in which a legislative act contravenes the constitutional mandate, it is the duty of the courts to uphold the latter. "To deny this," said Alexander Hamilton, "would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves."

The Supreme Court has therefore struck down laws passed by Congress that conflict with the Constitution ever since the landmark 1803 case of *Marbury v. Madison*. For almost as long, the Court has invalidated constitutionally offensive state statutes as well. That duty, scholars insist, is grounded in Article VI of the Constitution, which commands: "This Constitution, and the laws of the United States which shall be made in pursuant thereof . . . shall be the supreme law of the land."

It was inevitable that the judiciary, of the three branches of government, would be charged with the responsibility of assessing the constitutional validity of legislation. To insure the judiciary's ability to perform this sensitive duty faithfully and neutrally, the framers deliberately shielded the judges from political pressures by guaranteeing them, within the Constitution itself, life tenure, and by further providing that their salaries could not be diminished through legislative act. Their independence, to quote Hamilton again, would insure "that inflexible and uniform adherence to the rights of the Constitution, which we perceive to be indispensable in the courts of justice."

This is not to say that the Federal courts' judgment relating to the constitutionality of legislation—including legislation on such issues as abortion, school prayer and busing—cannot be overridden. An unpopular Supreme Court decision on a constitutional issue can be overturned through a constitutionally prescribed means: an amendment to the Constitution. In fact, three times amendments have been proposed and ratified as a way of nullifying controversial Supreme Court decisions. (The 11th Amendment, which forbids a suit in Federal court against a state without its consent, was adopted to overrule a 1793 holding that the Supreme Court had jurisdiction over a case brought by two South Carolinians against the State of Georgia. In 1868, during the Reconstruction period following the Civil War, the 14th Amendment was enacted. This amendment, which proclaims that all persons born in the United States are full citizens of the United States, with all "rights and immunities" of citizens, overruled the infamous Dred Scott decision of 1857, which had declared that black slaves, as no more than pieces of property, lacked the rights of citizens. Finally, in 1913 the 16th Amendment was adopted to overturn a Supreme Court decision holding that the Federal income tax was unconstitutional.)

Constitutional amendments, however, are not a means most critics of the Court are eager to employ to bring about the changes they seek. Their passage requires a cumbersome procedure of ratification—as supporters of the proposed equal rights amendment well know. The framers deliberately made the amendment process cumbersome because they did not want expediency to prevail over constitutional rights. They believed that any alteration of the fundamental law of the land should enjoy the overwhelming and sustained support of the citizenry. A simple majority in both Houses of Congress, sufficient to pass the ordinary statute, should not be enough to justify permanent changes in the nation's charter of basic freedoms.

Herein lies the tactical appeal of the withdrawal-of-jurisdiction strategem. Many supporters of the 30 or so divestiture bills now before Congress freely admit that they are attempting to bypass the amendment process. Their rationale is simple: Since the popular support to override Court decisions by amending the Constitution is difficult to garner, why not accomplish the same result with a simple statute restricting the power of the courts to consider the constitutional principles they dislike? In 1964, following the Supreme Court's landmark decision on legislative reapportionment, Senator Everett M. Dirksen introduced a bill to withdraw Federal court jurisdiction in apportionment cases. When asked whether he was attempting to enact a constitutional amendment in the form of a statute, he responded: "[There is] no time in the present [legislative] session to do anything with a constitutional amendment. . . . We are dealing with a condition, not a theory." A candid and revealing response, then as now.

The rationale of our Constitution is not to be lightly ignored. It was designed to protect individual rights by vesting the Federal courts with the final, binding authority to interpret the fundamental law. The only way to override the Constitution as so interpreted is to amend it. The backdoor mechanism of withdrawing the Court's jurisdiction is clearly antithetical to the judiciary's role in the constitutional scheme. If the bills depriving the Court of the authority to hear cases on such topics as abortion, school prayer and busing are considered constitutional, Congress might just as well pass laws depriving the Court of the authority to hear constitutional claims based on such freedoms as speech and religion. The potential consequences are astonishing.

There is another contention being put forward by the proponents of the withdrawal-of-jurisdiction bills that needs to be discussed. These legislators note that the Constitution states that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." The "exceptions-and-regulations" clause, they argue, grants Congress wide-ranging authority to restrict the substantive categories of cases that may be appealed from the state and lower Federal courts to the Supreme Court. But to assert that the framers, who clearly intended the Supreme Court to exercise the power of judicial review, also intended to grant Congress plenary authority to nullify that power is to charge the framers with baffling self-contraction. Indeed, the history of the exceptions-and-regulations clause suggests that it was never intended to carry the heavy constitutional baggage with which the bill's supporters are now loading it.

The clause originated in the fears of some members of the Constitutional Convention that Supreme Court review of factual determinations (appellate review was to be "both as to law and fact") would impair the right-of-jury trial in the states. Hamilton stated: "The propriety of this appellate jurisdiction has scarcely been called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact." Since the practices with respect to appellate review of factual determinations varied so widely from state to state, the framers decided to leave to Congress, in the exceptions-and-regulations clause, the authority to regulate the scope of Supreme Court review of facts.

The clause was never meant to confer a broad control over appellate review of substantive legal issues, including issues of Federal constitutional law. Indeed, the Convention considered and rejected proposed constitutional language that "the judicial power shall be exercised in such manner as the legislature shall direct." Far from a mandate to effectively abrogate the vindication of constitutional rights, the clause was intended merely as a way to give Congress the authority to regulate the Supreme Court's docket with reasonable housekeeping measures. Thus, in the Judiciary Act of 1789, Congress restricted the Court's appellate jurisdiction over cases coming from the United States Circuit Courts to those in which the amount in controversy exceeded a prescribed minimum.

On only two or three occasions in its history, has the Supreme Court passed upon the consitititutionality of legislation seeking to limit its appellate jurisdiction. Both cases occurred over a century ago and both reveal constitutional defects in the current proposals relating to jurisdiction. In the first case, Ex parte McCardle, decided in 1869, the Court upheld a restriction on its appellate jurisdiction. Although relegated to a small niche in history, this case was enormously important in its day, for it involved a challenge to the post-Civil War Reconstruction program, in which Congress had placed 10 of the former Confederate states under military rule. McCardle had been imprisoned by the military government of Mississippi for the publication of allegedly libelous material. Pursuant to a Federal statute passed in 1867, he applied to a lower Federal court for a writ of habeas corpus ordering his release. He asserted that the Reconstruction Acts were unconstitutional. The court denied his application, and he appealed to the Supreme Court on the basis of that same Federal statute. Before the case was decided by the Court, however, Congress repealed that part of the 1867 statute which authorized appeals to the High Court. "We are not at liberty to inquire into the motives of the legislature," the Court held. "We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of the Court is given by express words."

Despite this pronouncement, the McCardle case is not ordinarily read as authority for a broad Congressional power to restrict the enforcement of constitutional rights in the Supreme Court. Under the Judiciary Act of 1789, McCardle could still apply for an original writ of habeas corpus in the Supreme Court. Therefore, the repealing act actually cut off only one avenue of habeas relief. The Court concluded as much in the 1869 case of Ex parte Yerger, a case that was in many ways strikingly similar to McCardle. Yerger held that the repealing statute did not affect the petitioner's right to apply for an original writ pursuant to the act of 1789. In contrast with the statute under consideration in McCardle, the bills that would forbid any Supreme Court review of busing, school prayer and abortion decisions would totally foreclose the possibility of a Supreme Court hearing on a claim of Federal constitutional right. Surely, McCardle cannot be considered a precedent for that.

This view is confirmed by *United States* v. *Klein*, decided in 1872, in which the Court struck down a limitation on its powers of appellate review. Klein administered the estate of a cotton plantation owner whose property was seized and sold by Union agents during the Civil War. Under legislation providing for recovery of seized property of noncombatant rebels upon proof of loyalty, Klein sued and won in the Court of Claims, proferring a Presidential pardon as proof of loyalty. The Court had previously interpreted a Presidential pardon as carrying with it a proof of loyalty. But pending the Government's appeal to the Supreme Court, Congress passed an act which legislated that acceptance of a pardon was, on the contrary, conclusive proof of disloyalty and one which, in addition, required the Supreme Court to dismiss for want of jurisdiction any appeal in which the claim for recovery was based on a pardon.

Invalidating that legislation, the Court concluded that Congress had unconstitutionally attempted to interfere with the Court's duty to interpret and give effect to a provision of the Constitution: "The language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny pardons granted by the President the effect which this Court had adjudged them to have. The proviso declares that pardons shall not be considered by this Court on appeal. We had already decided it was our constitutional duty to consider them and give them effect, in cases like the present, as equivalent proof of loyalty."

In a similar manner, the current withdrawal-of-jurisdiction proposals do "not intend to withhold appellate jurisdiction except as a means to an end." And the end, in this instance, is precisely the same as it was in Klein, the circumvention of the Supreme Court's authoritative interpretation of a constitutional provision. As Klein demonstrates, Congress does not have the power to subvert established constitutional principles under the guise of regulating the Court's appellate jurisdiction.

Those who would read the exceptions-and-regulations clause broadly also argue that state courts, which frequently rely on the Federal Constitution in striking down state legislation, could adequately protect constitutional rights without reveiw in the Supreme Court. The short answer to this contention is that a Federal constitutional right is of dubious value if it means one thing in Mississippi and another in Minnesota. State courts have at times differed profoundly on the meaning of constitutional provisions. To cite but one illustration, in 1965, the Supreme Judicial Court of Massachusetts concluded that the book "Fanny Hill" was unprotected by the First Amendment. At about the same time, the New York Court of Appeals found that it was. Obviously the need for uniformity in matters of Federal constitutional interpretation is essential, and the appellate jurisdiction of the Supreme Court was designed to meet that important need. Chief Justice John Marshall said in *Cohens* v. *Virginia*: "The necessity of uniformity as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of deciding, in the last resort, all cases in which they are involved.* * * [the framers of the Constitution] declare that, in such cases, the Supreme Court shall exercise appellate jurisdiction."

In connection with this uniformity function, there is an interesting tale concerning one of the most eminent jurists in American history, Judge Learned Hand of the United States Court of Appeals for the Second Circuit. In 1958, at the ripe age of 86, Hand, still nimble of mind and capacious of spirit, was asked by Senator Thomas C. Hennings Jr. of Missouri, chairman of the Senate Judiciary Subcommittee on Constitutional Rights, to comment upon a then-current bill to remove Supreme Court appellate jurisdiction in cases regarding internal security. Hand promptly responded: "It seems to me desirable that the Court should have the last word on questions of the character involved. Of course there is always the chance of abuse of power wherever it is lodged, but at long last the least contentious organ of government generally is the Court. I do not, of course, mean that I think it is always right, but some final authority is better than unsettled conflict."

It should also be self-evident that the framers saw independent, tenured Federal judges—knowledgeable in Federal law, drawn from all over the country and, as prescribed in the Constitution itself, appointed by the President and confirmed by the Senate—as more appropriate arbiters of conflicts between constitutional and state law than elected state judges, many of whom are popularly elected and who might be partial to state law. The framers realized that only the Federal judges could insure the supremacy of Federal law. As James Madison said: "In controversies relating to the boundary between the two jurisdictions [Federal and state], the tribunal which is ultimately to decide is to be established under the general Government.* * * Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact."

The argument for giving Congress the authority to determine the kinds of cases and the types of remedies that the inferior Federal courts may hear is a bit more complicated—if equally unpersuasive. It too is based on Article III of the Constitution, which gives Congress the right to establish "such inferior courts as the Congress may from time to time ordain and establish." Since this provision has been interpreted by many legal experts as giving Congress the right to establish or abolish the lower courts, does it not follow that it also gives Congress the authority to regulate the subject matter of their jurisdiction? The fallacy of this argument is that the framers predicated Congressional discretion on the assumption that litigants would in all cases be able to present their Federal claims or defenses to some Federal court, either in the district court or on appeal. And it was further assumed that, even if no lesser Federal courts were created, the Supreme Court itself would serve as the requisite forum by hearing all constitutional cases appealed from the state courts.

Throughout most of the 19th century, this was possible. The Court's docket was almost empty by today's standards and it could ordinarily hear a constitutional case any time one of the parties so desired. But beginning about 1875, the Supreme Court's case load began to grow enormously, giving rise to a series of acts, culminating in the Judges Bill of 1925, which gave the Court the discretion to decide which cases within certain categories, it would hear. In the process, the Supreme Court was transformed from a general court of appeal into a court which would decide only cases of great constitutional moment of high precedential value.

As the Supreme Court has found itself deciding a progressively smaller percentage of the cases involving Federal, constitutional and statutory law, the role of the lower Federal courts in protecting constitutional rights has expanded to the point of practical and effective primacy. And over the last two decades, a period during which there has been an explosive growth of litigation, the inferior Federal courts have become, in most instances, the only forums in which a litigant could secure a decision on his constitutional claims by a judge life tenured under Article III of the Constitution. If Congress were now to abolish the lower Federal courts, it would effectively cut off almost all opportunity for Federal adjudication of Federal rights. And clearly, the framers did not wish to leave to the states final authority to decide matters of Federal constitutional law. For the reason, the argument that Congress can withdraw jurisdiction over certain classes of Federal cases or rights because it has discretion to abolish the lower courts does not hold up under examination.

Authoritative precedent also strongly suggests that even if Congress had the power to abolish some or all of the lower Federal courts, it may not use its power over lower court jurisdiction to thwart the vindication of constitutional rights. The Court of Appeals for the Second Circuit said in Battaglia v. General Motors Corporation, decided in 1948, that, "while Congress has the undoubted power to give, withhold and restrict the jurisdiction of courts * * * it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law."

The conclusion that can be drawn from all of these arguments is this: Congress does indeed have broad discretion to withdraw jurisdiction from lower Federal courts—where no substantive constitutional rights are at issue. The statutory rights that owe their existence to Congress, as distinguished from constitutional rights, may be taken away either by a repealing statute or by a provision withdrawing Federal Court jurisdiction. Where rights embodied in the Constitution are concerned, however, the discretion of Congress is limited. When Congress deprives a Federal court of the authority to hear a litigant's constitutional claims or defenses, it must provide that litigant with another Federal forum in which to seek an adequate remedy. The distinguished legal scholar Henry Hart once decried the use of statutes withdrawing lower court jurisdiction to undermine constitutional rights: "Why, what monstrous illogic! To build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction! And into a power to do it in contradiction to all the other terms of the very document which confers the power to regulate jurisdiction!"

Applying these lessons to the divestiture bills now before Congress, there can be no doubt that all of them trench upon established constitutional rights. The Supreme Court has determined that busing may be a constitutionally required remedy in an appropriate case for violations of schoolchildren's equal-protection rights to an education in a desegregated public school. Chief Justice Burger has written for the Court: "Bus transportation has long been and integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." In the landmark case of Roe v. Wade, the Court firmly established a woman's constitutional right to an abortion. And for nearly two decades, the Court has found mandatory prayer in the public schools to violate the constitutional principle of separation of church and state.

One may disagree with these decisions; they may even transgress one's deepest moral convictions. But one cannot doubt that they were based upon informed interpretation of the Constitution—and not on the basis of political or ideological expediency. It is worth recalling the pungent words of Chief Justice Charles Evans Hughes: "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution." Depriving the Federal courts of the power to adjudicate cases relating to such issues as desegregation, abortion and school prayer effectively precludes Federal protection—the constitutionally envisaged and most reliable form of protection—of our cherished constitutional rights.

The result of the proposed legislation would be to deny citizens the protection of constitutional rights that the Supreme Court has declared they possess. It would be strange indeed if Congress could accomplish through a jurisdictional bill what it clearly may not accomplish directly: a reversal of constitutional principle by an act of Congress. The law is clear, for example, that Congress has no power to declare racial discrimination in Federal Government employment legal. The "logic" of the arguments raised by the proponents of the divestiture bills would, however, permit Congress to remove from the Federal courts all jurisdiction to hear cases involving racial discrimination against Government employees. The motive, discrimination, would be equally patent in either instance.

If one needs to find language in the Constitution as a source for these restrictions on the power of Congress to control the jurisdiction of the lower Federal courts, it is in the due-process clause of the Fifth Amendment. The overarching guarantee of due process is the sacred assurance that the Federal Government will govern fairly, impartially and compassionately. All the powers of Congress—to tax, to make war, to regulate commerce—are constrained by its constitutional inability to deprive us of our rights to life, liberty and property without due process of law. As a power of Congress, the authority to control jurisdiction is therefore restricted by the right of due process. That is the wonder of the American Constitution as it lives and breathes.

Should Congress insist upon restricting the judiciary in ways that the Supreme Court may view as unconstitutional, the Supreme Court might well strike down the withdrawal-of-jurisdiction legislation, leaving Congress and the judiciary in conflict. This institutional dissension would continue, until Congress either accepted the Court's determination or passed a constitutional amendment restructuring the basic relationship between the judicial and legislative branches of government.

It is understandable that politically vulnerable legislators would react adversely to judicial nullification of their enactments. Yet those who criticize the courts for their unresponsiveness to the present national mood tend to forget that the judicial branch was not designed as just another barometer of current public opinion. Congress is superbly adequate for that function, and we ought not to presume that the framers intended the judiciary as an institutional redundancy. In exercising their power of judicial review, the courts have represented the long-term, slowly evolving values of the American people, as enshrined in the Constitution. And when the people have recognized Congressional court-curbing efforts for what they are—assaults on the Constitution itself—they have in every instance rejected them.

It is of no small interest that even some of the supporters of the divestiture bills have begun to question the constitutionality of these proposals. And, indeed, there is a glimmer of hope that these doubts will eventually permeate Congress. The long history of Congressional court-curbing measures reveals that the legislative branch has in every instance ultimately yielded to the judiciary's duty to interpret the Constitution and has not (at least since passing the statute involved in the Klein case more than a century ago) challenged the courts with a jurisdictional bill that would impinge upon the fulfillment of that duty. Robert McKay, former dean of the

New York University Law School, wrote of bills to withdraw jurisdiction over apportionment cases: "Once again, as so often in the past, when the implications of the proposed legislation were made clear, the Congress would not quite cross the threshold of no return."

The political risks attending bills to withdraw Federal jurisdiction create another check on the legislative goal of certain Congressmen. Groups of all persuasions have attempted to achieve their political aims through attacks on the Court's authority to decide constitutional cases. While it is true that political conservatives are the strongest supporters of the current efforts to withdraw jurisdiction, liberal reformers have also utilized this strategy in the past. Employed successfully by today's political majority, it could easily be manipulated tomorrow by a different majority—and to other ends.

In the final analysis then, while the current divestiture bills should be a cause for concern about the ability of our constitutional system to withstand the onslaught of restrictive legislation, there is also room for hope. In the long history of court-curbing efforts, the majority has always, in the end, acknowledged the clear intention of the framers. To preserve the rights of the people, the Federal judiciary must interpret and apply the Constitution unfettered by unseemly limitations on its jurisdiction. The current Congress is a body of distinguished and wise legislators who are unlikely to sacrifice the long-term good of the Republic for speculative and short-term political gain. As the New England poet James Russell Lowell once said, "Such power there is in cleareyed self-restraint." As the first Monday in October draws near, there is reason to believe that Congress will be instructed by the lessons of history and see that the constitutional powers of the highest court in the land—and of other Federal courts—should remain inviolate.

## PART 3.—ADDITIONAL ARTICLES

## REPORT ON THE CONSTITUTIONALITY OF H.R. 4273 A PROJECT OF THE HARVARD JOURNAL OF LAW AND PUBLIC POLICY RESEARCH BUREAU BY JOSEPH E. RENDINI

### INTRODUCTION

On March 2, 1977, Representative Philip Crane (R.-Ill.) introduced H.R. 4273, a bill to withdraw from the jurisdiction of all federal courts all cases relating to abortion. The present Report examines the constitutionality of this bill, hereinafter referred to as the Crane Bill, and briefly discusses some of its non-constitutional, prudential ramifications.

There are two major provisions in the Crane Bill. The first restricts the appellate power of the Supreme Court by denying it jurisdiction to review any type of state abortion legislation. The second denies jurisdiction over the same category of cases to the federal district courts. The latter provision present little problem. The case law reveals that the fact of Congressional power to control the jurisdiction of the inferior federal courts is well-established.[1] The bill is safe from constitutional objection on this point.

It is the first proposition above, pertaining to the question of making exceptions and regulations to the appellate jurisdiction of the Supreme Court [2] which raises much more interesting and intricate questions. There is only one case in the history of the Court and the nation where anything definite is actually held with respect to the Exceptions Clause.[3] It is favorable, but arguably limited by its facts and alternately assailable as bad law. But before discussing any of the cases, a review of the potential theoretical and constitutional problems with an expansive reading of the Exceptions Clause is in order.

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[1] *E.G., Lockerty* v. *Phillips.* 319 U.S. 182 (1943); *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323 (1938); *Kline* v. *Burke Constr. Co.*, 260 U.S. 226 (1922); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850); *Stuart* v. *Laird*, 5 U.S. (1 Cranch.) 299 (1803). *See* Redish & Woods, *Congressional Power to Control Jurisdiction of the Lower Federal Courts*, 124 U. Pa. L. Rev. 45 (1975). *But see* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L. J. 498 (1974).

[2] "In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const., art. III, § 2.

[3] *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) (discussed in Section II.D. *infra*). *But see United States* v. *More*, 7 U.S. (3 Cranch.) 159 (1805) (discussd in Section II.A. *infra*).

## I. THE VIEWS OF THE COMMENTATORS

The Supreme Court has made many pronouncements about the power of Congress to control its appellate jurisdiction. Most of these pronouncements have been in support of the notion of Congress' plenary power in this area. Justices as disparate as Ellsworth, Marshall, Taney, Warren, Douglas, and Frankfurter have at various times expressed such a view. However, none of these views has actually been the holding of a case and some have been so summarily expressed as to cast doubt on their underlying reasoning. Also somewhat sobering are the facts that Justice Douglas seems to have changed his mind on the matter once or twice without any real attempt at explanation, and that Justices Marshall and Ellsworth made comments which arguably put a damper on the free exercise of that Congressional power. Ellsworth, in fact, can be taken as expressing both views within the same opinion.

Where the best that can be gleaned from the cases are dicta, dissent, and inference, much will depend on the practical and theoretical arguments that can be mustered from a reading of history, a sensitivity to the values expressed by the doctrines of separation of powers and federalism, and an understanding of the practical needs of the courts if they are to defend the "spirit" of the Constitution. Thus the language of the cases must be read in light of the arguments put forward by modern commentators if we are to anticipate the outlines of any potential constitutional opposition.

First, however, it will be useful to note the arguments in favor of an expansive reading of the Exceptions Clause. Basically, there is only one argument, and while it might appear somewhat facile in terms of constitutional interpretation, it can be put forward with considerable strength. It is this: Congress has plenary power over the appellate jurisdiction of the Supreme Court because that is the most natural and direct reading of the words of Art. III, §2 of the Constitution.[4] The possibility of describing this Congressional power as an integral part of the system of checks and balances and the strengths that the case for an expansive reading gathers from the strong dicta that has supported it over the course of two centuries will be discussed below. At this point, however, I will merely stress that if the Court is to be brought to heel in any area, whether it be abortion, affirmative action, or interference with the rights of states to govern themselves, it will have to be done by bludgeoning the Court with the word of the Constitution and hammering away at the point that the Constitution is not a document written only to be understood through the subtle interpretations of lawyers, but written to be plainly understood by the general public. It does not belong to the profession; it belongs to the people. And if we read it with a fineness of interpretation that melts away the substance of its words and leaves only considerations of the relative importance of this factor and that factor, we will have destroyed its comprehensibility and dignity in the eyes of the people, which will be to have destroyed it altogether.

But there are several lines of argument in opposition to any reading of the Exceptions Clause which would give Congress full control over the Court's appellate jurisdiction. They are:

1. The power of Congress to make exceptions and regulations refers only to the Court's treatment of facts and stems from the conflicting needs perceived at the Constitutional Convention on the one hand to protect trial by jury and on the other to allow the Supreme Court to review findings of fact in admiralty cases where our relations with foreign powers might be involved.
2. The exceptions power is limited to the extent that Congress may not interfere with the essential functions played by the Supreme Court in the overall Constitutional scheme, e.g., upholding constitutional rights and striking down unconstitutional statutes. Obviously, this view is tied in with that which accords a special role to the Court's power of judicial review.
3. Related to 2, but somewhat more expansive is the view that the exceptions power is limited by the Supremacy Clause[5] and by the Equal Protection Clause[6] of the Fourteenth Amendment. The Constitution must thus be interpreted consistently

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[4] *See* Weschsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005 (1965).

[5] "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and *the Judges in every* State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, §2 (emphasis added).

[6] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV.

from state to state in order that there be one supreme "law of the land" and also so that constitutional rights may be equally applied throughout the nation.

*A. The admiralty/fact limitation*

This limitation stems from the very early case of *Wiscart* v. *D'Auchy*,[7] and Alexander Hamilton's comments in Federalist 81.[8] The foundation of the argument is laid by Hamilton. In the Federalist 81 he discussed the appellate jurisdiction of the Court over matters of "law and fact," acknowledging fears that such a grant of appellate power would endanger the power of a jury finally to determine fact. Then, as now, the right to be tried by a jury of one's peers was looked upon as a vital safeguard against tyranny, especially in criminal cases. But Hamilton urged that still, a broad grant of power here was necessary with regard to certain civil causes, especially what he termed "prize causes" or admiralty actions. Hamilton said:"It is therefore necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury because in the courts of some of the States *all causes* are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe."[9]

Thus, it is fairly plain that the exceptions power applies to the regulation of fact questions coming before the Supreme Court, but this much is clear upon a reading of the language of Art. III, §2. What is not clear, and is not made clear by Hamilton's discussion, is that the exceptions power applies only to the regulation of questions of fact. Hamilton was trying to assure a rather testy audience that trial by jury would not be impaired. In the Federalist 81 he attempts to do this in several ways. His final argument is, in essence, that if all else fails, Congress can always step in to preserve trail by jury by exercising the exceptions power. He is here trying to justify the use of the word "fact," not to delineate the boundaries of the application of "exceptions." That Hamilton argues that the exceptions power extends to matters of fact is no reason to suppose that he is saying that it does not apply to matters of law, or to any phase of the Court's appellate jurisdiction. Hamilton's discussion, then, cannot be taken as establishing the limits, if any, to the exceptions power.

The second root of the purported admiralty/fact limitation is the case of *Wiscart* v. *D'Auchy*.[10] This case, involving an admiralty matter, revolved around the construction and applicability of certain sections of the Judiciary Act of 1789, the Act by which the First Congress set up the inferior federal court system and determined its jurisdiction, simultaneously specifying the appellate jurisdiction of the Supreme Court. The Court's construction of the relevant sections of the Act would determine whether it heard the case on a writ of error, in which case it could review only questions of law, or as an appeal, in which case it could review both questions of law and fact. Both Chief Justice Ellsworth, who wrote the majority opinion (and the rebuttal, as was then customary), and Justice Wilson, who spoke in dissent, had been members of the Constitutional Convention's Committee on Detail, which drafted the Exceptions Clause.[11] Thus their exchange here is of some significance.

The majority concluded that the case had come before it on a writ of error, and that whether or not the Court had before it the evidence upon which the lower court had based its findings of fact, those findings were conclusive. Justice Wilson, maintaining that the case was on appeal, disagreed, saying, "Such an appeal is expressly sanctioned by the Constitution; it may therefore . . . be considered as the most regular process; and as there are not any words in the judicial act restricting the power of proceeding by appeal, it must be regarded as still permitted and approved. *Even, indeed if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the Constitutional provision.*"[12]

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[7] 3 U.S. (3 Dall.) 321 (1796).

[8] See Merry, *Scope of the Supreme Court's Appellate Jurisdiction: The Historical Basis*, 47 Minn. L. Rev. 53 (1962); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 Ore. L. Rev. 3 (1973); Levy, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. L. Rev. 178, 180-81 (1967).

[9] The Federalist, No. 81 (emphasis added).

[10] 3 U.S. (3 Dall.) 321 (1796). *See* Merry, *supra* note 8, at 68-69.

[11] *See* Merry, *supra* note 8, at 68-69.

[12] 3 U.S. (3 Dall.) at 325 (emphasis added).

This seems rather compelling, considering that it was written by a man who was present at the creation of the Exceptions Clause, and, indeed, some commentators have seized upon this language.[13] However, several observations must be made in connection with Justice Wilson's comments. The first is that it is dictum. By his own admission, Justice Wilson does not need to make a constitutional finding to support his view of the case. Second, it is a minority view. Third, the statement must be read in context. It is perhaps the first of the rather summary, almost unthinking, and usually peripheral comments made on the legislature's power over the judiciary's jurisdiction. Indeed, the bulk of Wilson's dissent, and by far the most carefully thought-out portion, deals with his construction of the Judiciary Act, and not with his casual mention of possible constitutional limitations on the exceptions power, which, ironically, has given his dissent a modicum of fame. Finally, Justice Wilson himself did not seem to view the constitutional point as that pertinent because, in the summation of his dissent, he concludes that "[t]he legislature might, indeed have made exceptions, and introduced regulations upon the subject; but as it has not done so, the case remains upon the strong ground of the Constitution."[14] There is no further mention of any possible constitutional limitations; only this statement of what Congress might have done, but did not.

In rebuttal, Chief Justice Ellsworth took issue with Wilson's view of the Court's appellate jurisdiction, thereby foreshadowing Chief Justice Marshall's later development of the "negative pregnant" view of Congressional control over that jurisdiction, discussed below. His comments are also a bit more pertinent for our purposes than Wilson's passing swipes at a potential constitutional objection because Ellsworth is here addressing directly the question of the nature of the legislature's power as brought up by the dissent.

The Chief Justice said: "Here, then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question * * * on the consitutional point of appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise."[15]

Though this rebuttal, like the dissent, lacks the authority of a majority holding, it makes clear what the thinking of the Court has been from early on. As we shall see when we review the cases, this line of thought is picked up by Chief Justice Marshall, and Chief Justice Taney after him, persisting throughout the nineteenth century in recurring dicta, until its emergence into law with the holding of *Ex parte McCardle.*[16] We shall then seek to show that it has survived right up until the present day.

One further point in *Wiscart* deserves attention. Chief Justice Ellsworth makes a statement near the end of his rebuttal opinion which might be interpreted as hinting at a limit on congressional regulation of the Court's appellate jurisdiction. Somewhat lengthy quotation is required to avoid misinterpretation. "[I]f an appellate jurisdiction can only be exercised by this Court conformably to such regulations as are made by the Congress, and if Congress has prescribed a writ of error, and no other mode, by which it can be exercised, still I say, we are bound to pursue that mode * * *. The law may indeed be improper and inconvenient; but it is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be. *If, however, the construction* [given by the Court to the statute here regarding the case as before the Court on a writ of error and not as an appeal] *that a statement of facts by the circuit court is conclusive, would amount to a denial of justice, would be oppressively injurious to individuals, or would be productive of any general mischief, I should then be disposed to any other rational exposition of the law, which would not be attended with these depreciated consequences.*[17]

The sentence emphasized above is as important for what it leaves unsaid as for what it says; and whatever it does say, it definitely does not say that the law specifying how the Court is to exercise its appellate jurisdiction can be nullified by an appeal to some provision of the Constitution. All it says is that, within the limits of rationality, such a law should be interpreted so as not to involve a denial of justice, oppressive injury, or general mischief. Any effect the other provisions of the Constitution may have upon the power of Congress over the Court's appellate jurisdiction is left to our speculation.

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[13] *See, e.g.,* Brant, *supra* note 8.

[14] 3 U.S. (3 Dall.) at 326.

[15] *Id.* at 327.

[16] 74 U.S. (7 Wall.) 506 (1869)

[17] 3 U.S. (3 Dall.) at 328–29 (emphasis added).

Another argument in support of the notion that the exceptions power should be limited to questions of fact rests on certain actions of the Constitutional Convention. It appears that the delegates to the Convention rejected an amendment to section 2 of Art. III which would have spelled out in more specific terms the full control of the Congress over the Court's appellate jurisdiction. The proposed amendment read, "In all other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct." [18]

Were this all we had to indicate the intention of the Framers and their contemporaries, one could still argue that it is not at all clear what the Convention meant by this action. It is always risky business to infer the intent of a committee from what it declines to do. However, while we are in the business of so doing it should be pointed out that there is another rejected amendment which bears on this point.

Evidently, the question of the Court's appellate power stirred up a controversy at the Virginia Ratifying Convention. George Mason and Patrick Henry drafted a resolution which was adopted by the Convention. In this resolution was contained an amendment to that section referred to above. It read: "In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction as to matters of law only—except in cases of equity and of admiralty and maritime jurisdiction in which the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and other regulations as the Congress shall make." [19] Needless to say, this proposed amendment never achieved wide acceptance.

In his article, Brant argues that this proposed amendment, a more explicit restriction of the exceptions power to matters of fact, supports the contention that the article as finally passed embodies that restriction, evidently because the fact that the amendment was proposed indicates that the problem it addressed was on people's minds. The method of construing the rejection of the amendment proposed in Philadelphia, however, might well lead to the opposite view of the meaning of the rejection of this amendment. But it is probably safer to say that, between one rejected amendment and the other, no clear picture of the intent of the Convention or of the ratifying States can be drawn.

We have gone over the admiralty/fact argument at some length in the hope of disposing of it. Neither Hamilton nor Wilson in *Wiscart* are really on point in support of it; and the argument based on the amendments discussed above merely runs in circles. The two Arguments remaining, however, are at once less involved and less easy to refute. They address the crux of the Constitutional question and there are really no definitive answers to them, for such can be given only by the Court. We will seek to put forward these arguments fully, but will not attmpt to refute them in the systematic manner in which we have attacked the admiralty/fact limitation. Later, in our review of the cases and conclusion, we will develop an argument in support of the Congressional exceptions power.

### *B. The essential functions test*

Henry Hart in his famous article, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,*[20] does not pay a great amount of attention to the particular problem we have been addressing here but he does make one proposal: any "* * * exceptions [to the Supreme Court's appellate power] must not be such as to destoy the essential role of the Supreme Court in the constitutional plan."[21] Ratner echoes this point, although his discussion is much more elaborate.[22]

Basically he argues that Congress cannot make exceptions which would negate the Court's "essential constitutional functions" of maintaining the uniformity and supremacy of federal law. Thus he might be seen as shading into the third type of argument for limiting the exceptions power, as discussed below.

Neither Hart nor Ratner elaborates much on what the essential functions of the Court are. In fact, Merry has criticized the essential functions test as resting on "indefinite grounds."[23] In addition to this indefiniteness, another problem arises in that the only body which can give some clarity to the application of such a test would be the Supreme Court, thus putting the Court in the novel position ("novel" at least in terms of the classical American political tradition) of being able to determine the extent of its own power. Fear of such a situation should lead the Court to avoid using such an indefinite standard to defene its appelllate power.

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[18] Levy, *supra* note 8, at 183.

[19] Brant, *supra* note 8, at 27-28.

[20] 66 Harv. L. Rev. 1362 (1953).

[21] *Id.* at 1365.

[22] Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court,* 109 U. Pa. L. Rev. 157 (1960).

[23] *See* Merry, *supra* note 8, at 166, 168-71,173.

*c. The supremacy clause/equal protection clause limitation*

"The mere necessity of uniformity in the interpretation of the national laws decides the question [of whether the judicial power of the United States should extend to cases arising under the Constitution and laws of the United States]. Thirteen independent courts of final jurisdiction over the same causes, arising under the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.[24] Changes, * * * restricting the appelate jurisdiction of the Court * * * would result in leaving final decision of vastly important National questions in the State or inferior Federal Courts, and would effect a disastrous lack of uniformity in the construction of the Constitution, so that fundamental rights might vary in different parts of the country.[25] I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.[26]

The three quotations above express the foundations of a third possible restriction upon Congress' use of the Exceptions Clause. Any such use would seem, of constitutional necessity as well as of the practical requirements of our federal system, to be required to meet the strictures of the Supremacy Clause and of the Equal Protection Clause. To restate the argument, the Supreme Court's appellate jurisdiction must be available to ensure that the Constitution remains the "supreme law of the land," and, with that, that federal statutes maintain their superiority over state statutes. In order to ensure supremacy, the Court must have review over the decisions of inferior federal courts and state courts dealing with the Constitution or federal laws. Elsewise inconsistency in application will arise, and supremacy means nothing if it cannot be uniformly recognized what the supreme law, be it the Constitution or a federal statute, means. In addition, according to the second branch, the doctrine of equal protection, as derived from the Equal Protection Clause of the Fourteenth Amendment and from the Due Process Clause requires that constitutional rights be applied consistently from state to state as well as from circuit to circuit. (This is an important argument of which we should be aware because, as you will remember, the Court in *Roe* v. *Wade*[27] constitutionalized a woman's "right" to an abortion under a "right to privacy" which the Court found implicit in the Fourteenth Amendment.) Thus, to assure this consistency, the Court must retain its appellate jurisdiction intact with respect to cases involving the assertion of constitutional rights.[28]

These theoretical limitations on the power of Congress to control the Court's jurisdiction seem reasonable and persuasive. Perhaps they will be the arguments that will carry the day. Yet, it is hard to conceive of the Framers giving the Court an unchallengable final right to decide questions concerning constitutional rights and at the same time giving it broad and extremely flexible power virtually to create new such rights by interpreting the Constitution. And especially is this so in light of the fact that one of the main fears expressed by the general public with respect to the ratification of the Constitution was that of the potential for tyranny in the creation of a federal judiciary.[29] Yet the limitations and the fears put forward above are substantially reduced if the Exceptions Clause is viewed as part of the system of Checks and Balances incorporated into the Constitution in order to maintain the delicate separation of powers.[30] And if the exceptions power is there to eliminate any "inconveniences," as Hamilton describes them in the Federalist No. 81, that might arise from the Court's exercise of its appellate jurisdiction, it is hard to see how the exceptions power can be any other than a check on the Supreme Court, and a balance for the Congress. Indeed, in light of the fears at the time of ratification, fears that have been reborn today, this would seem to be the proper interpretation of the clause.

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[24] A. Hamilton, The Federalist, No. 81.

[25] Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act,* 47 Am. L. Rev. 1, 27-28 (1913), *quoted in* Elliot, *Court-Curbing Proposals in Congress,* 33 Norte Dame Law. 597 (1968).

[26] O.W. Holmes, Law and the Court, in Collected Legal Papers 295-96 (1920).

[27] 410 U.S. 113 (1973).

[28] See Note, *Limitations on the Appellate Jurisdiction of the Supreme Court,* 20 U. pitt. L. Rev. 99 (1948) [hereinafter cited as *Limitations*]; Comment, *Removal of Supreme Court Jurisdiction: A Weapon Against Obscenity,* 1969 Duke L. J. 291, 305-19 [hereinafter cited as *A Weapons*].

[29] See Hamilton's efforts to assuage such fears in The Federalist, No. 78.

[30] *See Glidden* v. *Zdanok,* 370 U.S. 530 (1962). *But see A Weapon, supra* note 28, at 304.

Thus, we have delineated the last half of our argument, and perhaps it is best to foreshadow the rest at this point. The only real challenge to the Exceptions Clause, and unfortunately, one that directly affects our bill, is that the appellate jurisdiction of the Supreme Court must always be available to ensure that the Constitution and federal statutes remain the supreme law of the land and to maintain equal protection under the laws. This is a constitutional argument whose power cannot be underestimated and is tied into the expansive view of judicial review that the Court has taken since Marshall's opinion in *Marbury* v. *Madison.*[31] The only way to counter this argument, it seems to me, is to put the Exceptions Clause on a pedestal of equal constitutional necessity and sanctity; to pit Equal Protection against Separation of Powers and let the devil do his worst. On this level, the issue is arguable, if not exactly favorable to us; at least, a man who holds to one constitutional doctrine against another cannot be accused of having no respect for the Constitution. And, at all costs, we want to avoid what Harry Truman described as playing "fast and loose with the Constitution," although it might be pointed out that throwing a little healthy terror into the justices has on occasion, but by no means always, been an effective congressional tactic against the Court.

Thus, basically, the argument in favor of the bill is:

1. As the cases will show, the tendency of the Court, without making any definitive statement on the matter, has been to say that the Court, by virtue of Marshall's "negative pregnant" argument and the Judiciary Act of 1789, may not exercise its appellate power without an affirmative authorization of Congress.

2. Congress, even after it makes such an affirmative grant of jurisdiction, retains full control over the Court's appellate power except, and only except, that it may not so constrict the Court's judicial function that the effect of its action is to prescribe a rule of decision in a pending case. At this point Congress has interfered not with the Court's jurisdiction, which it may control, but with the very mental processes by which the Court reaches a judicial decision and has itself violated the principle of separation of powers.[32] But the limiting effects of the Supremacy and Equal Protection Clauses do not apply to Congress' exercise of power under the Exceptions Clause, because this clause was meant as a vehicle by which Congress could curb the power of the Court, whether this power developed to an excessive degree along the lines of the Supremacy Clause, the Equal Protection Clause, or any other constitutional provision. The record of history shows that Congress has been very sparing with the use of this power precisely because it has realized its high responsibility in this area.

One further factor needs to be mentioned. Putting aside the Supremacy Clause and the Equal Protection Clause, there may be practical, as opposed to constitutional, limitations on not so much the ability, but the desirability of Congress limiting the Supreme Court's appellate jurisdiction. Especially for our purposes such limitation may well turn out to be counter-productive. This topic will be discussed in the last section of this report.

## II. THE VIEWS OF THE JUSTICES: THE CASES

### *A. Marshall: The negative pregnant*

In the preceding section we have already discussed the case of *Wiscart* v. *D'Auchy,* and mentioned that Justice Wilson's dissent put forward the view that Congress had the power to make positive exceptions to the Court's appellate jurisdiction while Chief Justice Ellsworth argued that without a "rule" provided by Congress, the Court could not exercise its appellate power.[33] In *United States* v. *More,*[34] Chief Justice Marshall went Ellsworth's route with somewhat of a variation. The case involved the preliminary question whether the Court could assert its appellate jurisdiction over a criminal case originating in the District of Columbia. The Attorney General argued that the Court could take jurisdiction, that the appellate jurisdiction of the Supreme Court extended to all cases enumerated in Art. III except those for which Congress had made exceptions or regulations. In finding that the Court did not have jurisdiction, the Chief Justice had this to say:

"The [Attorney General's] argument would be unanswerable if the Supreme Court had been created by law, without describing its jurisdiction. The Constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject.

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[31] 5 U.S. (1 Cranch.) 137 (1803).

[32] See *McCardle, Yerger,* and *Klein,* discussed in Section II. D.

[33] 3 U.S. (3 Dall.) at 327-28.

[34] 7 U.S. (3 Cranch.) 159 (1805).

"But, as the jurisdiction of the Court has been described [by the Judiciary Act of 1789] it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation under the Constitution, prohibiting the exercise of other powers than those described."[35]

This doctrine, first put forward by Marshall here, that an affirmative grant of certain appellate power is an implied denial of all appellate powers not mentioned, has been dubbed the "negative pregnant" argument, and it appears to be the Court's holding. It should be noted that this decision was on a preliminary hearing on a motion to dismiss for want of jurisdiction, and so the question of jurisdiction was directly before the Court and was directly answered.

Marshall elaborated further on this doctrine in 1810 in the case of *Durousseau* v. *United States.*[36] Here the case was a civil matter and the question was of the Court's ability to hear a case on appeal from the District Court of Orleans, a territorial court having jurisdiction over an area in what is now the state of Louisiana. Marshall explained the negative pregnant doctrine in this way:

"The appellate powers of this court are not given by the judiciary act [of 1789]. They are given by the Constitution. But they are limited and regulated by the judicial act and by such other acts as have been passed on the subject.

"When the first legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases, but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it."[37]

Thus although there is some variation between the two, in the view of Marshall, as well as that of Chief Justice Ellsworth before him, the Court has only that appellate power which Congress affirmatively gives it. Ellsworth's opinion was given in rebuttal and thus we have no way of knowing what the majority of his court would have said had the point been addressed in the opinion, although we might guess that the majority would have followed his reasoning. But as to the negative pregnant doctrine there need by no guesswork. It was espoused by Marshall, embraced by a majority of the Court, made the cornerstone of a constitutional holding in *More,* and reaffirmed as a governing principle in *Durousseau.* It has never been repudiated. Indeed, as we shall see, the rhetoric of some subsequent cases might even be taken as going further in the direction of Congressional control than the negative pregnant doctrine.

On the other hand, some commentators have argued that the only reason Marshall adopted the negative pregnant test was that the grant of jurisdiction contained in the Act of 1789 was sufficiently broad to please him.[38] At best, this is a poor argument to make and especially poor to make against a great Chief Justice. In the first place, there is no way to tell what he liked or disliked, so the argument is capable of no logical refutation. Furthermore, it assumes that Marshall either failed to see the possibility of substantial cutbacks by Congress of the Court's appellate power, or that he saw the issue and, while believing that there would be limits upon Congress power to cut back, decided to say nothing about it. The latter contention is an assault against his dignity, the former against his intelligence, and it seems unlikely that the Chief Justice is assailable on either front. All that needs be said here is that Marshall was not one to back down from tough questions when the proper development of the young republic demanded an answer,[39] and that he was no stranger to the animosity of Congress. Had Marshall believed that the Constitution imposed any limits upon this power of Congress he surely would have made some mention of the fact, or at least the possibility, of their existence. As it was, he saw no such limits, and so he said nothing.

### *B. Taney: A step further?*

It has been claimed that, after Marshall, the Court went a bit overboard in describing the power Congress possesses over the appellate power of the Court.[40] This is probably true, looking especially at some of the pronouncements of Chief

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[35] *Id.* at 173.

[36] 10 U.S. (6 Cranch.) 307 (1810).

[37] *Id.* at 313.

[38] *See* Levy, *supra* note 8, at 185.

[39] Among his many decisions see his pronouncements on the duty of the judiciary in *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821).

[40] *See* Levy, *supra* note 8, at 186.

Justice Taney, but upon close analysis it is evident that the overstatement has not done violence to Marshall's "negative pregnant" doctrine.

For example, in *Barry* v. *Mercein*,[41] the Chief Justice states that "[b]y the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by an act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes." [42] This position seems closer to that of Ellsworth's rebuttal in *Wiscart* than to Marshall's in *More*. And similarly to Ellsworth's position, as long as there is any judiciary act on the statute books, there is no functional difference between this description of the appellate power and the negative pregnant. Still, Taney completely ignores the fact, and it seems he attempts to refute it, that the source of the Court's appellate power is not in any act of Congress, as Marshall explained in *Durousseau*, but in Art. III. Is this shift of any significance?

Probably not. The statement made above by Chief Justice Taney was dictum. The case, over which the majority determined it did not have jurisdiction, was decided on the basis of failure to have met the jurisdictional amount requirement, a determination made consistently with Marshall's negative pregnant doctrine. The other two cases cited above present similar situations. In *Barry* v. *Mercein* and in *Curry*, there was no reason for Taney to reinterpret the Constitution, and, as the cases would have come out the same way under the negative pregnant doctrine, there is no reason to believe that he seriously intended to change that doctrine. And, as long as a judiciary act, any judiciary act, was in effect, the difference between the appellate jurisdiction's being conferred by the Constitution with implied negative exceptions and regulations made by Congress and its being conferred directly by Congress is quite subtle. Chief Justice Taney can perhaps be forgiven if he glossed over this point as he was dealing with the matter only as a peripheral swipe of his pen. From a functional viewpoint, moreover, his description was accurate: without specific Congressional authorization the Court could not take appellate jurisdiction in the matter he had at hand. Taney's description of the Court's appellate jurisdiction here did not do violence to the negative pregnant doctrine, nor did it rewrite the Constitution, nor did it extend the Court's dependence on the Congress to ridiculous and dangerous lengths.

### *C. The supremacy clause cases*

At the close of the previous section we spoke of the purported Supremacy Clause/Equal Protection Clause limitation upon Congressional power granted by the Exceptions Clause. Five opinions, two by Chief Justice Marshall, one by Justice Story, and two by Chief Justice Taney, have been cited in support of the limiting power of the Supremacy Clause.[43] The Marshall and Taney opinions deal with the Supremacy Clause but do not discuss the Exceptions Clause. Succor is drawn by those who wish to cut down the exceptions power by broad language in those cases describing the necessity behind and the actual operation of the Supremacy Clause. In all of those cases, the Court was either asserting its own power to review the final decisions of the highest courts of the states where such provisions come under its Art. III appellate powers, or, in *Marbury* v. *Madison*, upholding the power of Congress to pass statutes without having their effect limited by the actions of state legislatures. There is no discussion, no mention, of any effect the Exceptions Clause might have in those situations, indeed because Congress had not exercised its power to make such exceptions. In light of the broad language used by Marshall and Taney in support of the exceptions power elsewhere,[44] the broad language they use here in support of the Supremacy Clause cannot be taken as putting limits upon the exceptions power. As Marshall said:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." [45]

Only Justice Story's opinion in *Martin* v. *Hunter's Lessee* makes any mention of the Exceptions Clause. In this case, responding to a decision of the Virginia Court of

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[41] 46 U.S. (5 How.) 103 (1847).

[42] *Id.* at 119. *See also United States* v. *Curry*, 47 U.S. (6 How.) 106, 113 (1848); *Daniels* v. *Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1866).

[43] *See, e.g., A Weapon, supra* note 28, at 306-07. The five cases are *Marbury* v. *Madison*, 5 U.S. (1 Cranch.) 137 (1803); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1806); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Dodge* v. *Woolsey*, 59 U.S. (18 How.) 331 (1855); and *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1858).

[44] See Sections II.A., B. *supra*.

[45] *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

Appeals, Mr. Justice Story found that the Supreme Court did indeed have appellate jurisdiction over a state's highest court. But he also developed what had been his theory for some time prior to the writing of this opinion, that the words of Art. III, stating that the judicial power of the United States "shall be vested * * *," imply that Congress must give to the courts of the United States the entire judicial power they are capable of receiving under the Constitution. In other words, "shall be vested" means "must be vested." In support of this contention, Justice Story cites the Exceptions Clause, arguing that if the language "shall be vested" had meant only "may be vested," then that clause would be superfluous. "It is apparent, then, that the exception was intended to enable Congress to regulate and restrain the appellate power, as the public interest might * * * require." [46]

Justice Story's theory of the nature of the judicial power did not ultimately win the Court's acceptance,[47] but it is interesting here to note that he did not find the existence of the exceptions power as somehow inconsistent with federal supremacy or the need for uniformity of constitutional interpretation from state to state.[48] That the coincidence of these general policies did not, at least on the face of things, trouble Story, is some indication that it did not trouble his contemporaries either. Thus the seemingly conflicting language of Marshall and Taney, on the one hand speaking broadly in support of the Supremacy Clause and on the other hand just as broadly favoring the Exceptions Clause, may not be so conflicting after all.[49]

### *D. McCardle, Yerger, and Klein: The reconstruction cases restricting jurisdiction*

Three cases arose in the post-Civil War Reconstruction Era that bore upon the scope of Congress power under the Exceptions Clause and all of these dealt with Congressional attempts to limit the Court's power to review lower court decisions under the writ of habeas corpus. The first of these was *Ex parte McCardle.*[50] It came before the Court on appeal from the Circuit Court for the Southern District of Mississippi, where the appellant had originally filed a petition for a writ of habeas corpus, alleging unlawful restraint by the military authorities. The Circuit Court issued the writ, return was made, and upon hearing, the court decided that the appellant's restraint was lawful, remanding him into military custody. He appealed to the Supreme Court.

While the case was pending before the Court, Congress passed the Act of March 27, 1868,[51] section 2 of which read: "And be it further enacted that so much of the Act approved February 4, 1867 entitled "An Act To Amend an Act To Establish the Judicial Courts of the United States," approved September 24, 1789, as authorized an appeal from the judgment of the circuit court to the Supreme Court of the United States, for the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed." [52]

The Court held that this statutory provision deprived it of jurisdiction to hear the case even though it was *sub judice.*[53] The Court cited *Wiscart* and *Durousseau* with approval, stating, in reference to Marshall's negative pregnant argument, that no negative needed to be implied because the exception, in this instance, was expressly made.[54] The Court did specify, however, that it retained all appellate jurisdiction granted it by the Act of 1789, including that over habeas corpus cases, and that the statute quoted above excepted from its jurisdiction only appeals from circuit courts under the Act of 1867.[55]

This last point has been interpreted as limiting the holding of *McCardle* to its facts. Here the Court retained its habeas corpus jurisdiction under the Act of 1789 and relief was still available to the appellant by the route therein prescribed.[56] No case, however, has so held.

But the Court had indicated it will be quite sticky about finding that Congress has made an exception. How far this might be seen as a limitation on the holding in

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[46] *Martin* v. *Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 333 (1806).

[47] *See, e.g., Sheldon* v. *Sill,* 40 U.S. (8 How.) 440 (1850); *Kline* v. *Burke Constr. Co.,* 260 U.S. 226 (1922).

[48] Chief Justice Marshall did not participate in *Martin* v. *Hunter's Lessee.*

[49] On the Equal Protection Clause, see *Morey* v. *Dowd,* 354 U.S. 457 (1957); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Railway Express Agency* v. *New York,* 336 U.S. 106 (1949).

[50] 74 U.S. (7 Wall.) 506 (1869).

[51] 15 Stat, 44.

[52] 52 Id.

[53] 74 U.S. (7 Wall.) at 513–14.

[54] *Id.*

[55] *Id.* at 515.

[56] *See, e.g., A Weapon, supra,* note 28, at 300-02; *Limitations, supra* note 28, at 107–08; Levy, *supra* note 8, at 192.

*McCardle* is not known. In *Ex parte Yerger*,[57] the Court faced a situation almost identical to that in *McCardle*, except that it was requested to issue its own writ in order to review the proceedings in the circuit court rather than attempt to review the circuit court's action on appeal of its writ (this was McCardle's alternate relief). The Court, in an opinion by Chief Justice Chase, who had also written the *McCardle* opinion, considered two questions: the first, whether under the Act of 1789 it had jurisdiction to inquire into and give relief in a habeas corpus proceeding, and the second, whether if such jurisdiction existed, it had been taken away by the Act of 1868. The Court answered the first question affirmatively but the second negatively, essentially repeating its finding in *McCardle* that the Act of 1868 limited jurisdiction gained under the Act of 1867, and that its original power to issue writs of habeas corpus under the 1789 Act was unimpaired.[58] Thus, the limitation was construed strictly as applying to the exact *McCardle* situation only.

Looked upon in this light, the limitation of *McCardle* to its facts does not appear to be a limitation of the exceptions power *Yerger* construed a narrowly constructed exception narrowly, as was proper. Although the Court indicates that it will be demanding with respect to exceptions made to its appellate jursdiction by Congress, it has not herein indicated that it will invalidate an exception as beyond the power of Congress to make.

The situation is much different in the case of *United States v. Klein*.[59] Just as *McCardle* is the first case to uphold a positive exception to the Court's appellate jurisdiction, so *Klein* appears to be the first case to strike down such an exception. A plausible rationale is given by the Court for its action, the real question being whether the case is sufficiently distinguishable on its facts from *McCardle* to support that plausible rationale.

In *Klein*, the situation involved a suit to claim the proceeds from the sale of property seized during the war. Despite the fact that the claimant had collaborated with the Confederacy, which would have disqualified him from claiming any recovery under the applicable statute, the Court of Claims found for the claimant in light of the fact that he had received a presidential pardon. While the case was before the Court, Congress attached a rider to the Judicial Expenses Act of June 30, 1871, which purported to cut back the Court's appellate jurisdiction over Court of Claims cases where a presidential pardon to the claimant recited the facts of his rebellion, and commanded that the Court dismiss all such cases presently pending "forthwith."

The Court, once more speaking through Chief Justice Chase, denied that Congress had the power to make such an exception. An exception that has simply denied the right of appeal to a particular class of cases would have been valid, but here the Congress had tried to dictate to the justices what effect a particular piece of evidence should have, and that was here to force them to give an effect to such evidence opposite to what they otherwise would. This was a blatant exercise of the judicial power by the Congress, according to the Court, and also an impingement, in this case, of the executive's power to pardon. Such interference into the respective powers of its coordinate branches was not a proper exercise of the exceptions power by Congress.

*Klein* has been taken to hold that Congress may not prescribe a rule of decision for a case currently pending before the judiciary,[60] and as forbidding Congress from denying certain claimants relief available to others of the same class.[61] But do these limitations also eliminate the Congress' power to act as it did in *McCardle? Macardle* has been distinguished from *Klein* by the fact that after the withdrawal of jurisdiction in the former, the appellant still had a route open toward the securing of Supreme Court review, while in the latter the Congressional action foreclosed all possible review by the Supreme Court.[62] While this may be a proper distinctions, it by no means helps the Crane Bill, which seeks to deprive the Court of all review power. Thus, *Klein* presents a troublesome problem. However, the scope of the Crane Bill may itself present a solution, since the bill would not differentiate between members of a class but would completely bar all review. Thus, if the distinction is as we have suggested, a solution is possible. However, this question is undecided and the Court, itself, is unsure of how to construe the situation it has created.[63]

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[57] 75 U.S. (8 Wall.) 85 (1869).

[58] *Id.* at 102-03.

[59] 80 U.S. (13 Wall.) 128 (1872).

[60] *See Glidden v. Zdanok*, 370 U.S. at 568; *A weapon, supra* note 28, at 303-04.

[61] *See Limitations, supra* note 28, at 104.

[62] Levy, *supra* note 8, at 192.

[63] *See Glidden v. Zdanok*, 370 U.S. 530 (1962).

### *E. From reconstruction to the present*

Since *McCardle*, *Yerger*, and *Klein*, the Court has not again given to the Exceptions Clause such a rigorous examination. The Court and several individual justices have made some interesting observations upon the exceptions power but nothing approaching a definitive statement of its extent has been forthcoming. What is more, the remarks which the Court has since made on the subject have not all tended toward the same direction. Some decisions have contained broad language reaffirming *Wiscart* and *Durousseau* and emphatically restating the proposition that the Court has only that appellate jurisdiction which Congress has conferred upon it.[64] Of especial interest is Justice Frankfurter's language in his dissent in Tidewater Transfer. Albeit in dictum, he says, "Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this [the Supreme] Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while the case is *sub judice*."[65]

Other opinions have made unexplained, almost cryptic references to a limit upon the exceptions power.[66] Again, at least one case has stated that the power of the Court to review state court decisions[67] is limited by any congressional exercise of its exceptions power.[68] Plainly then, the Court has bounced about considerably. In *Glidden* v. *Zdanok*,[69] Justice Harlan, speaking for the majority, cited *McCardle* for support of the proposition that the withdrawal of jurisdiction in a pending case is not inconsistent with the concept of the grant of the judicial power of the United States to the federal courts. Such power to control jurisdiction was to enable the Congress to check the power of the federal judiciary.[70] Harlan observes, however, that this congressional power is not "unlimited." And that limit seems to be that which he credits *Klein* with establishing, i.e., that Congress may not prescribe for the Court a rule of decision in a pending case.[71] Of course, this is not the holding of the case and so it settles nothing. It certainly did not settle justice Douglas' mind, for he dissented, doubting whether *McCardle* was still good law.[72] However, by the time of his concurring opinion in *Flast* v. *Cohen*,[73] he had evidently lost these doubts, giving no reason for his aboutface.

One last case deserves mention. It is *Johnson* v. *Robinson*.[74] In his majority opinion Justice Brennan intimated that the Court always retains jurisdiction to inquire into the constitutionality of a statute and that any statute which tried to keep this question from the Court would be of questionable constitutionality.[75] Among the cases he cites in support of this point are *McCardle* and *Martin* v. *Hunter's Lessee*. The reference to these cases is mystifying. If Justice Brennan's intimation is correct, however (and bear in mind that it is not as straightforward as stated here), then the Crane Bill will run into trouble at the stage of judicial review because it seems from *Roe* v. *Wade*[76] that this proposed bill involves constitutional rights, viz., the right to privacy as discussed above. However, Congress might be more willing to pass such a bill if it knew that the Supreme Court would play the role of guardian of constitutional rights. However, this is all speculation, and there is no reason to believe that this pronouncement of Justice Brennan will have any more weight than that of Justice Harlan in *Glidden* v. *Zdanok*. But, upon reflection, we may anticipate that if the Court seeks to adopt a restrictive view of the exceptions power, a combination of the two limiting theories applied by the aforementioned two justices might give substance to the "essential functions" described by

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[64] *See, e.g., The Francis Wright*, 105 U.S. 381, 385-86 (1881); *Luckenbach Steamship Co., Inc.* v. *United States*, 272 U.S. 533, 536-37 (1926); *Continental Casualty Co.* v. *United States*, 314 U.S. 527 (1942); *Stephan* v. *United States*, 319 U.S. 423 (1943); *Carroll* v. *United States*, 354 U.S. 394 (1957); *United States* v. *Mine Workers*, 330 U.S. 258 (1946) (opinion of Rutledge, J., dissenting); *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1948) (opinion of Frankfurter, J., dissenting).

[65] 337 U.S. at 655 (citing *McCardle*).

[66] *See, e.g., United States* v. *Bitty*, 208 U.S. 393, 399 (1908) (majority opinion by the elder Harlan); *Chandler* v. *Judicial Council*, 398 U.S. 74, 111 (1969) (concurring opinion of the younger Harlan).

[67] *See Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

[68] *ST. Louis & Mo. So. R. Co.* v. *Taylor*, 210 U.S. 281, 292 (1908).

[69] 370 U.S. 530 (1962).

[70] *Id.* at 567.

[71] *Id.* at 567-68.

[72] *Id.* at 607.

[73] 392 U.S. 83, 109 (1968).

[74] 415 U.S. 361 (1974).

[75] *Id.* at 366-67.

[76] 410 U.S. 113 (1973).

Ratner and Hart, discussed above. The Court's "essential functions" could thus be described in terms of the judicial power. Non-interference with rules of decision, a la *Klein*, and with the ability to pass on constitutional issues, as suggested by *Johnson*, would be the limitations imposed upon Congress' power.

This would probably be the most adverse position the Court could feasibly take. It fairly well negates any role that the exceptions power may play in the system of checks and balances. All the Court need do to cloak itself with the impenetrable mantle of judicial power is to declare that it is deciding a constitutional issue or to discover some new constitutional right. Congress would be justified by its own peculiar duty to uphold the Constitution in balking at such formulation if it is ever reached by the Court.

To sum up this section, then, since the Era of Reconstruction, the Court has not been clear on the question of how far the exceptions power extends. Cases from *Wiscart* to *Ex parte Yerger* expressed no inherent limits upon the power, but with *Klein* the Court began to concern itself with the possible constitutional conflicts that could arise from the exercise of this power. As discussed above, the most likely areas for restricting the power are those in which it directly confronts the traditional judicial function.

But a countervailing force is present. The plenary control notions expressed in *Wiscart*, *More*, and *Durousseau* live on through *The Francis Wright*, *Continental Casualty*, and *Stephan* v. *United States*, [77] and are still vibrantly expressed by a jurist of no less repute than Felix Frankfurter in his *Tidewater Transfer* dissent. Justice Burton also reluctantly agreed with this view.[78] He believed that the exceptions power is a "constitutional flaw," but he did not deny that it gave Congress extensive power over the Court's appellate jurisdiction. Perhaps the strongest support for this view comes from the late Justice Roberts, who was so concerned with the potential damage Congress could do to the Court's appellate jurisdiction with such power that he advocated a constitutional amendment to delete the Exceptions Clause from Art. III, § 2.[79] Thus it is impossible to predict just what the Court will say, but the issue is not cut and dried. Either side can urge serious constitutional arguments on its behalf and neither side, in so doing, can be sure of victory.

At this point what was said earlier about bludgeoning the Court with the words of the Constitution should be mentioned again. Art. III, § 2 of the Constitution provides in express terms that Congress shall have the power to make exceptions and regulations to the Court's appellate jurisdiction. All the language intimating limits upon this constitutional grant of power has been no more than a gloss put upon the constitutional language by later judicial interpretation (much later, we might add). Taken in proper context, a climate of great public apprehension toward the creation of a federal judiciary (a climate to which Hamilton addressed himself in the Federalist No. 81), the language of the Constitution must be seen as providing the popularly elected Congress with some measure of control over the potential power of a federal judiciary. The exceptions power is an integral part of the system of checks and balances. Its greatest function is in the possibility of its being used. Usually, this is enough to ensure that the Court will not be tempted by its otherwise almost unchecked power from wandering, or trespassing, into the legislative and executive spheres. True enough that there are uses of this power by Congress which seem to go against the grain of the Constitution such power was intended to protect. But such was the fear of the Framers and the public, a fear all too sadly borne out by recent history, that a drastic remedy was perceived as the necessary one to a potentially drastic constitutional crisis. The Framers envisioned a republican form of government, each coordinate branch carefully checking, within its own sphere, the actions of the others, so that liberty for the people might be produced in the balance. But should this balance be upset, it cannot be unlikely that those who designed this republic would choose for it to be upset in favor of that one branch most accountable to the people.

History has shown that this one branch to which such power has been given has acted wisely and well in its exercise. Often it has expressed the displeasure and annoyance of the people at some of the decisions of the Court, but seldom, very seldom, has it exercised that power. In its verbal jousting with the Court, it has served the interests of both Court and Nation; for Americans are not serfs who humbly submit to any restrictions of their conduct, however justified; they are free men, in whom the habit of liberty is so strong that they rear back and snap at whatever might inhibt them. And yet recent history has also shown that, for all such snapping, the American sense of justice is what triumphs, and so this nation, guided by all three branches of its federal government, has moved through one of the most reasoned and sustained periods of generally peaceful social change known to any people at any time. All this has been accomplished by strict adherence to the guiding words of our Constitution.

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[77] See note 64 *supra*.

[78] *See* Burton, *Two Significant Decisions: Ex parte Miligan and Ex parte McCardle*, 41 A.B.A. J. 121, 126 (1955).

[79] *See* Roberts, *Now is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A. J. 1, 3-4 (1949). *But see* Grinnell, *Proposed Amendments to the Constitution: A Reply to Former Justice Roberts*, 35 A.B.A. J. 648 (1949).

But there is a point beyond which the Constitution does not guide and beyond which the people will not be led. In the final analysis, it is the American people who interpret, fulfill, and defend with their very lives the words of the Constitution. There is that point where interpretation becomes so attenuated, where the exercise of power becomes so arbitrary, and where leadership becomes so intrusive and ridiculous in its self-proclaimed wisdom that the people can no longer bear it. Our generation has seen an errant executive, too willing to read the bounds of his power by his own lights rather than the lights of the people, brought to heel by the people acting through their elected representatives in the Congress. Should the Court make the same mistake with regard to the extent of its powers, surely it will not escape the same tribunal. When any branch of the government save the Congress seeks to write the Nation's laws, when any branch of this government save the Executive seeks to enforce them, when the rumblings of the people speak of usurpations of power and a decided list in the delicately balanced machinery of its government, then the duty of Congress is clear: it must exercise its authority under Art. III, § 2 of the Constitution, not to upset the creation of the Framers, but to restore the balance intended to dwell therein.

The case law is indeterminate. The battlefield will be the intent of the Constitution. The above is the best argument available for the Crane Bill. The Court will decide as it will decide, but there is a good enough argument to make such a bill debatable in the legislature.

## III. PRACTICAL CONSIDERATIONS

### A. *Likelihood of legislative approval*

As stressed in the discussion above, the Congress has used the exceptions power very sparingly. Bills which invoke it, especially to the plenary extent of the Crane Bill, do not have a happy history.[80] The situation in the Alyeska Pipeline case was much different; appeal was not denied, but only regulated. Some interesting data were compiled by Professor Nagel.[81]

*Factors Affirmatively Correlated With Occurrence of Court-Curbing Bills*

1. Judicial review of federal and state statutes.
2. Economic rather than other issues.
3. Low degree of unanimity within the Court.
4. Democrat or liberal Congress when Court conservative.
5. Republican or conservative Congress when Court liberal.
6. Crisis present.
7. Public opinion and powerful pressure groups favor the attack.
8. The process for introducing bills in the House.
9. Lack of cohesive Congressional leadership.

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[80] The Jenner Bill, S. 2646, 85th Cong., 2d Sess. (1958) would have withdrawn from the appellate jurisdiction of the Supreme Court certain cases relating to subversive activities. It would not have affected the jurisdiction of the lower federal courts. Hearings were held on the Jenner Bill, *Limitations of Appellate Jurisdiction of the United States Supreme Court: Hearing on S. 2646 Before the Subcom. to Investigate the Admin. of the Internal Security Act and Other Internal Security Laws of the Sen. Comm. on the Judiciary*, 85th Cong., 1st & 2d Sess. (1957-1958), but no action was taken.

The Tuck Bill, H.R. 11926, 88th Cong., 2d Sess. (1964) would have removed from the jurisdiction of the lower federal courts and the Supreme Court cases involving legislative reapportionments. It also went nowhere.

A number of other bills have been introduced in the last 25 years to eliminate the jurisdiction of the federal courts over a variety of specific subjects, but none of them were enacted. *See* P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 360–65 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]. On earlier Congressional efforts to curtail Supreme Court jurisdiction, dating back to 1821, see *id.* at 455–57.

[81] Nagel, *Court-Curbing Periods in American History*, 18 Vand. L. Rev. 925, 944 (1965).

*Factors Affirmatively Correlated With Success of Court-Curbing*

1. Sponsored by majority party in Congress.
2. Party split between Court and Congress.
3. Crisis present and allegedly made worse by Court's decisions.
4. Public and pressure group support.
5. Northern sponsored attack.
6. Introduced in Senate.
7. Limited in purpose.
8. Presidential support and cohesive Congressional leadership.[82]

*B. Effects of the bill if passed*

Wechsler points out[83] that there are practical problems with restricting the jurisdiction of the federal courts. For our purposes, the most devastating problem with stripping the Supreme Court of jurisdiction in the area of abortion is that such action freezes existing Supreme Court precedents into law. The Supremacy Clause still would demand that lower federal court and state court judges follow those precedents.[84] We can hardly suggest that these judges should attempt, de facto, to overrule *Roe* v. *Wade* and its progeny, and thus violate the Constitution. This point alone may compel us to drop the attempt to limit the Supreme Court's jurisdiction and settle instead for limiting only the jurisdiction of the lower federal courts. This avoids all constitutional problems and probably would have substantially the same effect as the bill as it now stands, considering the present composition of the Court. However, if the bill is to be used as a scare tactic against the Court rather than as a piece of legislation actually intended to be passed, then the section restricting the Supreme Court's appellate jurisdiction should be retained.

*C. The structure of the bill.*

There is not a great deal of alteration to be done. If the Supreme Court's jurisdiction is to be left intact, simply delete the first section of the bill and maKe the appropriate changes in section 2, whose scope is defined by reference to section 1. Otherwise, a separability clause should be added, which would merely state that should one or more of the sections of this act be struck down as unconstitutional, such action will not be determinative of the constitutionality of any other section. Such a clause would preserve the section of the act depriving the inferior federal courts of jurisdiction should the effort to deprive the Supreme Court of its appellate jurisdiction be adjudged unconstitutional.

The danger in not having a separability clause is that a reviewing court (including possibly a federal district court) might find that the intent of Congress was to negate all federal court review, which the court might find to be an unconstitutional purpose, so the entire bill would fail. If it is clear that Congressional intent was only to restrict federal court jurisdiction to the extent constitutionally permissible, by making the two provisions separable, you at least cut off the possibility of an initial adjudication of the issue in a lower federal court, since the second section of the bill is clearly constitutional standing alone.

*D. Alternative methods of attacking Federal court decisions relating to abortions*

Four types of constitutional amendments which would have the desired effects immediately suggest themselves. Two are aimed solely at the abortion issue, while two are aimed at creating a broad power in some group to overrule the Supreme Court. A final method of keeping the federal courts out of the abortion issue involves a combination of state legislation and litigation, but the effectiveness of this method is highly conjectural.

A constitutional amendment which would be coterminous with the Crane Bill could be patterned after the Eleventh Amendment:[85] "The judicial power of the United States shall not be construed to extend to any suit in law or equity, relating to abortion." Such an amendment would clearly take the federal courts out of the picture, but would share two of the problems inherent in the Crane Bill. First, it would be up to the federal courts to determine which cases "relate to abortions." While the phrase seems fairly straightforward, it is not inconceivable that a court might, for example, characterize a suit arising under a state statute providing for general medical benefits as not relating to abortions, even through the particular case involved an attempt to obtain state benefits for an abortion. This problem is less serious in the case of the Eleventh Amendment, since its exceptions are based on the parties rather than the subject matter.

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[82] *See also* Note, *Congressional Reversals of Supreme Court Decisions, 1945-1957*, 71 Harv. L. Rev. 1324 (1958); Elliott, *Court-Curbing Proposals in Congress, 33 Notre Dame Law. 597 (1958); Stumpf, Congressional Response to Supreme Court Rulings*, 14 J. Pub. L. 377 (1965).

[83] Wechsler, *supra* note 4, at 1006-07.

[84] See note 5 *supra*.

[85] "*The Judicial power of the United States shall not be construed to extend to any suit in law or equity*, commenced or prosecuted against one of the United States by Citizens of another State, of by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI (emphasis added).

The second problem with this type of amendment is one discussed above in relation to the Crane Bill, viz., that it would leave *Roe* v. *Wade* and the other Supreme Court precedents standing, thereby raising the Supremacy Clause problems.[86]

Another type of constitutional amendment would eliminate abortions completely. Such an amendment might simply extend the protection of the Due Process and Equal Protection Clauses to fetuses from the moment of conception: "Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws." [87] This would have the advantage of eliminating the adverse Supreme Court precedents on the abortion issue, but would leave the federal courts in the picture, and thus leave the possibility of mischief which the Crane Bill seeks to avoid. It would also have the advantages of neither interfering with the Supreme Court's jurisdiction, nor allowing anybody to overrule the Supreme Court, but simply setting forth a new substantive equal protection rule for fetuses.[88]

A third type of amendment would give Congress a much broader power to overrule the Supreme Court prospectively. Such an amendment has been proposed by Professor Kessler: "The Congress and the President shall have the power, as hereinafter provided, to interpret any provision of this Constitution, including any amendment thereof, heretofore or hereafter enacted. Such power shall include the power to overrule by case name or otherwise any decision of the Supreme Court of the United States, but any such overruling shall not affect the rights of the immediate parties to any such decision, although it may affect the rights of other members of the same class, and parties to any other litigation then pending, as well as all future cases and controversies." [89] The broad implications of such an amendment are discussed by Professor Kessler,[90] but for our purposes, it would allow Congress to overrule the adverse Supreme Court precedents, thereby avoiding the Supremacy Clause problems, but would again allow the federal courts to work their mischief, subject only to prospective overruling by the Congress.

Finally, the Court of the Union proposal might be resurrected. This proposal would have created a court composed of the chief justices of the fifty states, with power to review "any judgment of the Supreme Court relating to the rights reserved to the states or to the people by this Constitution." [91] This proposal is quite similar to the Kessler proposal, the only essential difference lying in the body given the authority to overrule the Supreme Court.

But constitutional amendments are not easily approved. For those who fear that the Constitution may become cluttered with too many amendments dealing with specific subjects, the latter two proposals above offer the advantage of generality, but the track record of proposed amendments to limit the jurisdiction of the Supreme Court,[92] or to give another body the power to overrule the Supreme Court,[93] is not impressive. In fact, no amendment of either sort has ever been passed.[94] Thus there seems to be little hope for a successful constitutional amendment.[95]

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[86] See Section III.B. *supra*.

[87] H.J. Res. 261 § 1, 93d Cong., 1st Sess., S.J. Res. 130 § 1, 93d Cong., 1st Sess., 119 Cong. Rec. 22,225 (1973). A large number of proposed constitutional amendments designed to reverse *Roe* v. *Wade* and *Doe* v. *Bolton* have been introduced. *See* Krimmel and Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction*, 46 U. Cin. L. Rev. 725, 814 n. 420 (1977) (this Article gives powerful and detailed scientific and sociological arguments against abortions).

[88] See text accompanying notes 89-91 *infra*.

[89] Kessler, *Redressing the Balance: A Proposed Constitutional Amendment*, forthcoming in 1 Harv. J. L. & Pub. Pol'y (Summer 1978). Section 2 of the Kessler amendment requires approval of two-thirds of each House of Congress and the concurrence of the President for the enactment of any such bill.

[90] *Id.*

[91] *Amending the Constitution to Strengthen the States in the Federal System*, 36 State Gov't 10, 13 (1963). *See also* Kurland, *The Court of the Union or Julius Caesar Revised*, 39 Notre Dame Law. 636 (1964); Oberst, *The Genesis of the Three States-Rights Amendments of 1963*, 39 Notre Dame Law. 644 (1964).

[92] For a brief discussion of some of the proposed amendments, dealing with, *e.g.*, legislative apportionment, school prayers, and school busing, see Hart & Wechsler, *supra* note 80, at 457.

[93] *See id.*

The state legislation/litigation theory adverted to above would require the state to pass some sort of abortion legislation, *e.g.*, denying certain benefits to women who have abortions, or making doctors criminally liable for performing them. This law would then be challenged in state court in a declaratory action brought either by a public interest group or by a potentially affected citizen. The theory relies on the fact that many states do not have the strict "case or controversy" requirement for adjudication which may bar suit in federal court. Thus, it is important that this state court suit be brought immediately after the law is passed and before a justiciable controversy arises within the meaning of Art. III of the United States Constitution.[96] If the highest state court decides in favor of the anti-abortion position, the case will presumably be brought to the Supreme Court for review, where it will be found non-justiciable. Later, when an actual controversy arises, *e.g.*, when the mother's benefits are cut off, or the doctor is prosecuted, the case will again go to the State Supreme Court, where the issue will be held to have been decided in the prior litigation, under the doctrines of prior adjudiciation [97] or virtual representation.[98] The case will then return to the Supreme Court for review, where again, the doctrine of prior adjudication and virtual representation may bar a review on the merits.

The last link is the weakest. The Supreme Court, not having considered the merits upon its first review, will not likely refuse review on the merits the second time on the basis of its first decision. Nevertheless, this mode of attacking Supreme Court abortion decisions is suggested by several past Supreme Court decisions.[99]

## CONCLUSION

In exercising the Congressional power to make exceptions to the appellate jurisdiction of the Supreme Court, the Crane Bill employs a potentially powerful constitutional tool. This technique might be applied to any number of substantive issues of law. As a tool for undermining the Supreme Court's decision on abortions, however, the Crane Bill seems to come up short. Thus if the primary goal is to establish the constitutionality of this technique, a separability clause should be added to the Crane Bill, and the issue should be confronted directly. On the other hand, if the primary goal is to vitiate the Supreme Court's abortion decisions, various alternatives to the Crane Bill should be considered.

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[94] The sole exception is the Eleventh Amendment, passed in 1978. See note 85 *supra*.

[95] A number of anti-abortion amendments have been proposed without success. See note 87 *supra*. *See also Abortion: Hearings on S.J. Res. 119 & S.J. Res. 130 Before the Subcomm. on Constitutional Amendments of the Sen. Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) (3 vols.); *Abortion: Hearings on S.J. Res. 6, S.J. Res. 10, S.J. Res. 11 & S.J. 91 Before the Subcomm. on Constitutional Amendments of the Sen. Comm. on the Judiciary*, 94th Cong. 1st Sess. (1975).

[96] The major doctrines of justiciability in the federal courts are standing, ripeness, and mootness. Standing doctrine is probably the most likely to provide a basis, in this case, for the Supreme Court refusing to review a decision of a State Supreme Court on abortion legislation. The Supreme Court seems to have been cutting back recently on the erstwhile explosion of standing to litigate. *See, e.g., Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth V. Seldin*, 422 U.S. 490 (1975); *Schlesinger* V. *Reservists' Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974). The earlier explosion of standing is exemplified by, e.g., *United States* v. *S.C.R.A.P.*, 412 U.S. 669 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727 (1927); *Flast* v. *Cohen*, 392 U.S. 83 (1968).

Mootness might also provide a basis for non-justiciability in the federal courts, if, e.g., the private litigant on the second trip to the Supreme Court has obeyed the challenged law, and had her child. *But see Sosna* v. *Iowa*, 419 U.S. 393 (1975) (where plaintiff beat a similar mootness argument by bringing a class action and claiming that although the case was moot as to her, it was not moot as to other members of the plaintiff class).

[97] *Res. judicata* and collateral estoppel.

[98] Presumably the original declaratory action will have been against the State as defendant. Where an issue has been litigated by a public entity, and a private citizen subsequently seeks to relitigate the same issue, the latter may be estopped from relitigating the same issue by the doctrine of virtual representaion, which assumes that the governmental entity defended the case as well as it could be defended, on behalf of its citizens. *See, e.g., Southwest Airlines Co.* v. *Texas Internat'l Airlines, Inc.*, 547 F.2d 84 (5th Cir. 1977).

[99] *See, e.g., DeFunis* v. *Odegaard*, 416 U.S. 312 (vacating and remanding to Washington Supreme Court), on remand, 84 Wash. 2d 617, 529 P.2d 438 (1974) (plurality favors reinstating prior decision on reverse discrimination); *Tileston* v. *Ullman*, 318 U.S. 44 (1943) (appeal to review declaratory judgment of Connecticut Supreme Court prohibiting use of contraceptives dismissed for lack of standing).

# THE COURTS AND THE CONSTITUTION†

HERBERT WECHSLER*

At a time when racial strife and sectional hostility give birth to such divisive forces in our culture, it takes vision and courage to affirm and reaffirm a faith in the great unifying force of law and legal institutions. The Faculty of Law and the distinguished trustees of the Charles Loridans Foundation surely have declared that faith by their foundation of the Sibley Lectureship. Believing, as I deeply do, that the welfare of our country depends largely on the vindication of precisely such a faith in law, I deem it a great honor to be asked to spend these days among you and to speak to you this evening.

I should be happy to be here, even if the auspices were less impressive. Unlike many Northerners, my concept of Athens never has been wholly Greek; nor, I may add, has my concept of Rome been wholly Roman. When I started teaching law, more than thirty years ago, my first collaborator, who became one of my closest friends, was Jerome Michael of Columbia; and Michael had been born and raised in Athens, Georgia. When in later years I entered government service, I had the privilege of working closely for a time with Charles Fahy, one of the great Solicitors General of the United States—now and for many years a Circuit Judge; and Fahy had been born and raised in Rome, Georgia. Hence, my perspective, as you see, has not been insular at all for many years.

I hope you will not think me sentimental if I say that my pleasure in being here tonight is increased by the knowledge that if Jerome Michael could but know, he would be pleased.

## I.

. My subject, chosen not without some prompting from Dean Cowen, I have called "The Courts and the Constitution"; but it will not surprise you if I speak particularly of the highest Court, for it above all others has the faculty of rendering decisions that accord a quality of rapid obsolescence to the learning we law teachers claim to have. My purpose is to ask you to reflect with me upon two aspects of judicial review as it functions in our polity; and I shall state them as two questions: *First,* What are the practical, political limits within which the Supreme Court exercises its august authority to set aside the actions of the other branches of the Government of the United States or of a State as inconsistent with the Constitution? *Second,* What are the moral limits of the power that this great responsibility entails?

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† The following article is the text of the John A. Sibley Lecture delivered by Professor Wechsler at the University of Georgia School of Law on January 19, 1965.

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Whatever you may think about the answers, I am confident you will not challenge the importance of the questions in the history of the Republic, or, indeed, their special pertinence in our time.

It is only thirty years since a majority of the Supreme Court held to conceptions of the Constitution that precluded any major governmental action in the ordering of the economy, despite the magnitude of the new problems posed by the dramatic transformation of the country from an agricultural to an industrial society. Restrictive applications of the due process and equal protection clauses of the fourteenth amendment weighed heavily on the claims of the States to formulate protective measures; and a narrow interpretation of the commerce clause, especially in the child labor cases, thwarted congressional action of fundamental economic reach. It is less than thirty years since this entrenched position was reversed by decisions rendered in the shadow of the Roosevelt proposal to enlarge the Court—a plan that was abortive, to be sure, but may have been one of those battles which, though lost, still won a war.

Those of us who lived through those exciting years may surely be forgiven if we thought at the time that the reconstitution of the Court by the appointment and promotion of its critics, coupled with the reformulation of its most embattled doctrines, presaged a long quiescent period in the judicial role in governance of our affairs—a period in which the Court would function less as the originator of controlling norms than as interpreter of norms derived from acts of Congress. It was not long before our competence as prophets was made clear. "There may be," said Justice Stone in 1938, "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." So too, he reflected,

> it is unnecessary to consider now [and the emphasis was certainly on *now*] whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . [or] whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . .[1]

Narrower scope, more exacting judicial scrutiny indeed! What a change in the legal cosmos those few words portended in the quarter of a century ahead! The first amendment freedoms not only read with growing strictness against Congress but applied with equal rigor against the States, including even the establishment provision; strict limitation on the censorship of movies and repression of obscenity; a critical eye on the investigative process; the right to "have the assistance of counsel" of the sixth amendment held to demand court appointments to defend the indigent—and this too finally absorbed in full by the fourteenth amendment as a limitation on the States. So too with search and seizure limitations of the fourth amendment, particularly the exclusionary rule which more than half the States had hitherto rejected; the exclusion of coerced confessions and, more recently, the fifth amendment privilege with all that it entails; the School decisions and their general extension to all state-supported segregation; the broad reach of federal habeas corpus as a post-conviction remedy; the rulings on apportionment, Congressional and State, with their insistence on "one man one vote" and, what is more a vote of equal weight so far as mathematics can assure it. This is a partial list but surely it is long enough to illustrate what has occurred.

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[1] United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

I do not offer this enumeration as a bill of grievances against the Court. Like any lawyer, I have grievances, of course, but I have also some enormous satisfactions. What is important is that any such extension of the national authority by a majority of nine, who hold their offices for life and must account to no constituency for their tenure, cannot fail to kindle grave dissatisfaction on the part of those who feel themselves deprived. The expression of such sentiment in recent years by state officialdom, including the judiciary, by members of the Congress, and by private groups are surely too familiar for rehearsal. This brings me to the first of the two questions I have put: What are the practical, political limits on the power of the Court to bind the other branches and the States, or, stated differently, what are the avenues through which dissatisfaction with decisions of the Court may hope to find a practical, political expression?

## II.

1. The first and most important point is that the Court has always been to some extent a self-correcting agency. Unlike the House of Lords, it does not disclaim authority to overrule its own decisions, professing, in the words of Taney, "as the law of" the Court "that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error." A Court which, as Taney also put it, regards the continuing vitality of a decision as dependent "altogether on the force of the reasoning by which it is supported"[2] necessarily initiates a dialogue when it pronounces an opinion.

To say that it initiates a dialogue, is not, of course, to say that it is necessarily attentive to its critics. Yet it is hard to think that the erosion of the *laissez-faire* position was uninfluenced by the sustained and vigorous attack that had been mounted for so many years in Congress, in the schools and in important organs of opinion, not to speak of the continuous dissent within the Court itself. Such names as Holmes, Brandeis, Stone and Cardozo on the Court; Norris, LaFollette, Walsh, Borah, Wheeler and Black in the Senate; Frankfurter, T. R. Powell, Herbert Croly among writers—to name but very few of very many—came to symbolize a protest movement of immense dimensions, urging that the Constitution was perverted by a reading which denied to our elected legislatures, national and state, power to solve pressing problems in the economic order by responsive legislation. Indeed, in the great debate in Congress and the country on the Roosevelt proposal to enlarge the Court, very few of the opponents of the plan had a good word to say for the decisions that provoked the controversy. They confined themselves, and rightly, to insisting that the Court should be protected as an independent institution, notwithstanding that the course of its decisions justified the widespread opposition. The remedy they offered was quite simply that the Court reverse itself; and—to the real surprise of many of its critics—that is exactly what it did.

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[2] Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849).

2. But what if criticism, though sustained by broad consensus, fails to move the Court to reconsideration and reversal of position? Can dissidence prevail in other ways?

Recourse to amendment calls for such widespread support as to the grievance and the remedy, that it will rarely be a practical solution, though the effort is continuously made. Of twenty-four amendments, only three can be considered the reversal of particular decisions;[3] only one of these occurred, you will recall, in modern times.

There are, however, other possibilities. If nature is cooperative, vacancies may open up in timely fashion. The dissidents then need but win the sympathy of the appointing and confirming powers, and—this is a large addition—guess correctly how the individuals whom they propose upon this basis for appointment would perform if the appointments should be made. History does not record that prophecies upon this point have always been successful. I should suppose that this is illustrated very plainly by some members of the present Court.

If vacancies do not occur, there is, of course, the possibility that Roosevelt selected, of a statutory increase in the number of the Court. But even the consensus that can normally enact an Act of Congress faces here the great resistance to overt manipulation of the institution. The experience of 1937 yields a lesson that no President is likely to ignore.

3. There are, however, other legislative possibilities. Article III vests an appellate jurisdiction in the Supreme Court of the United States in cases

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[3] The eleventh (1795) reversing the result of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Section 1 of the fourteenth (1868), displacing the rule of Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); and the sixteenth (1913), overcoming Pollack v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) and companion decisions.

arising under the Constitution, but the jurisdiction is conferred "with such Exceptions, and under such Regulations as the Congress shall make." Moreover, the Constitution does not itself create the federal tribunals inferior to the Supreme Court; it merely vests in Congress power to create them and, perforce, to determine how much of the jurisdiction which Article III permits the federal judicial power to encompass, they shall be authorized to exercise. Until 1875, for example, the lower courts had no general jurisdiction in cases arising under the Constitution or the laws;[4] even today their jurisdiction is often limited by the requirement of jurisdictional amount.

It follows from this that Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction. Under the *McCardle* case, even a pending case may be excepted from appellate jurisdiction. Judicial "duty," the Chief Justice said, "is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."[5]

The thought that Congress thus might thwart by statute the Supreme Court's role in the interpretation of the Constitution is, of course, anathema to many lawyers. For a time there was, indeed, much support for a constitutional amendment striking out the power of Congress to make "exceptions" to appellate jurisdiction. The last proposal[6] bore the name of Senator John Marshall Butler of Maryland, and it had an interesting fate. After the School decision it was quietly forgotten. Senator Butler gave his energies thereafter to a bill to except from the scope of the appellate jurisdiction five types of cases in which the Court had rendered controversial decisions.[7] His change of heart was shared no doubt by others.

There is, to be sure, a school of thought that argues that "exceptions" has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy clause or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court.[8] I see no basis for this view and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as "the supreme Law of the

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[4] See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727-33 (1953).

[5] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1869).

[6] S.J. Res. 44, 83d Cong., 1st Sess. (1953), introduced by Senators Butler and Henrickson.

[7] See S. 2646, 85th Cong., 1st Sess. (1957), introduced by Senator Jenner.

[8] See, *e.g.*, Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what *Marbury v. Madison*[9] was all about. I have not heard that it has yet been superseded, though I confess I read opinions on occasion that do not exactly make its doctrine clear.

The difficulty with legislative withdrawal of jurisdiction is not one of constitutional dimension, though, I should add that when I speak of withdrawal I mean, of course, complete elimination of all cognizance of cases of the kind. Congress could not, for example, employ federal courts as organs of enforcement and preclude them from attending to the Constitution in arriving at decision of the cause.[10] There are, however, practical objections to complete withdrawal that are of immense importance and are often overlooked.

To begin with, government cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law. Within that area, the opportunity for litigating constitutional defenses is built in and cannot be foreclosed. The same necessity for federal tribunals will be felt in many situations that do not involve proceedings for enforcement; it has led Congress in recent years to expand remedial jurisdiction by such measures as the Federal Declaratory Judgment Act, the Tucker Act, the Administrative Procedure Act and others I could name. The withdrawal of such jurisdiction would impinge adversely on so many varied interests that its durability can be assumed. Beyond this, if the jurisdiction of the Supreme Court alone is withdrawn in a given field, as happened in *McCardle*, issues are left to final resolution in the lower courts, which may, of course, reach contrary results in different sections of the country. If, in addition, all federal jurisdiction is withdrawn, the resolution is perforce left to the courts of fifty states, with even greater probability of contrariety in their decisions. How long would you expect such inconsistency in the interpretation of the law of the United States to be regarded as a tolerable situation? There is, moreover, still another difficulty. The lower courts or the state courts would still be faced with the decisions of the Supreme Court as precedents—decisions which that Court would now be quite unable to reverse or modify or even to explain. The jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted its enactment, placing an intolerable moral burden on the lower courts.

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[9] 5 U.S. (1 Cranch) 137 (1803).

[10] *Compare, e.g.*, Lockerty v. Phillips, 319 U.S. 182 (1943), *with* Yakus v. United States, 321 U.S. 414 (1944).

These are the reasons why congressional control of jurisdiction has so rarely been exerted as a method of expressing dissidence to constitutional decisions, even when such dissidence has won the sympathy of Congress. They are the reasons why the Tuck bill,[11] which would strip the courts of jurisdiction with respect to state apportionments, although it passed the House last August,[12] almost certainly could not have passed the Senate. The federal system needs federal courts and the judicial institution needs an organ of supreme authority.

I have not spoken of the oldest claim put forward in our history, the claim of the State legislatures to a role in the interpretative process, when they find themselves in opposition to the agencies of federal authority. The Kentucky Resolution did, indeed, deny that "the Government created by this compact" was "made the exclusive or final judge of the extent of the powers delegated to itself"—alluding in this instance to the Congress, not the Court.[13] But, like the milder Virginia Resolution,[14] drafted by Madison, it went no further than beseech collaboration of the sister states in the repeal of the offending Act of Congress. Having myself argued in the Supreme Court at its last term that the Sedition Act of 1798 was inconsistent with the first amendment,[15] I am much indebted to the Kentucky and Virginia Resolutions for the help that they afforded on this issue. No one can doubt, however, that state legislative statements merely constitute expression of a protest, having only such weight as their reasoning affords. Interposition was and is a form of propaganda, not a legal doctrine. That, at least, was settled on the battlefields of the Civil War.

If I am right in what I thus far have attempted to assert, is it not clear that while our system does preserve a measure of political control, both through the power to enlarge the Court and through the power over jurisdiction, the reservation is more theoretical by far than it is real? The real hope of any widespread protest movement is that it will influence the course of the decisions. The congressional control of jurisdiction does, however, serve to give a forum—and a forum of great dignity—for a protestant movement, in addition to that offered for proposals of amendment. The addition helps to assure that a protest strong enough to win both Presidential and congressional support is very likely to succeed without requiring a constitutional amendment. When, on the other hand, the President and Congress join in the rejection of the protest and support the Court by implementing legislation, as has happened with respect to voting rights and public schools, it is quite clear that our system gives to dissidence no other institutional avenue of expression.

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[11] H.R. 11926, 88th Cong., 2d Sess. (1964).

[12] 110 CONG. REC. 19589-19667 (daily ed. Aug. 19, 1964).

[13] Kentucky Resolution, Nov. 16, 1798, reprinted in COMMAGER, DOCUMENTS OF AMERICAN HISTORY 178 (7th ed. 1963).

[14] Virginia Resolution, Dec. 24, 1798, reprinted in COMMAGER, *op. cit. supra* note 13, at 182.

[15] See New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

4. Does this mean, then, that when this point is reached dissidence must simply yield or become civil disobedience, subject to the charge of lawlessness and thus to ultimate repression? A Frenchman would no doubt reply "*mais, c'est logique*"; but here too there are subtleties that call for candid recognition. Under *Marbury*, the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared. Lincoln gave the point classic expression in his *First Inaugural* in speaking of *Dred Scott*:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.[16]

A doctrine that is valid for the President and Congress surely must be valid also for the State and its officials. But note the purpose of the limitation stated: to allow for the "chance" that the decision "may be overruled and never become a precedent for other cases." When that chance has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation?

7 The answer here, it seems to me, must be affirmative, both as the necessary implication of our constitutional tradition and to avoid the greater evils that will otherwise ensue. What are those evils? There is, first, the burden on the courts when they are forced to deal with time-consuming and unnecessary litigation—a problem that the situation in your Circuit surely demonstrates to be severe.[17] Secondly, defiance breeds demand for more repressive

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[16] 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 3206, 3210 (1897).

[17] See C. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949 (1964).

sanctions, a demand to which, on the assumption I am making, both the courts and Congress, losing patience, will respond. This has already happened with respect to schools and voting in the recent legislation. It is happening within the courts on many fronts indeed. Adequate state ground in federal review of state decisions means no longer what it meant but a few years ago.[18] The doctrine of abstention, according a priority in many areas to state adjudication, totters under the decisions. It is argued that removal should be given a new scope in criminal proceedings, invoking an old Act of Congress tailor-made for such a purpose—a contention that is now before the courts.[19] There is clamor to employ criminal process for enforcement where proceedings now are usually civil, and to enlarge the criminal provisions of the statutes now in force. There is demand for federal police protection. All this is having and will have the gravest effect on the balance of our federalism, as that balance was worked out in placid times.

It is not surprising, therefore, that the bar has raised its voice so loudly on this problem, calling for a generous acceptance of decisions when their doctrine has been settled, as an act of self-subordination necessary to maintain the rule of law.[2] There comes a point where there can be only one answer to the call.

## III.

I have argued that there are political limits on the Supreme Court's authority to bind the other branches and the States by its interpretation of the Constitution but that such limits are not reached without a national consensus shared by both the President and Congress. Protest having less support cannot prevail in the long run unless, perchance, it moves the Court itself to a reversal of position.

This brings me to the second question that I wish to put before you: What are the moral limits on the exercise of the enormous power vested in the Court? By moral limits, I mean nothing more pretentious than the standards or criteria that both the Court and those who undertake to praise or blame its judgments are in reason obligated to support.

I need not say that there are many who consider this a wholly empty question. In their view, you either like the results of decisions or you don't, appraising them in terms of your own values or your objects of desire. Mr. Justice Curtis was a great man in Boston when he dissented powerfully in *Dred Scott*; he was a villain when in later years, after his retirement, he questioned the legality of the Emancipation Proclamation. Those who accept this view draw no distinction between politics and law, and urge the Court to function simply as a power organ. But think of trying to defend upon this basis vesting such enormous power in five men of nine, whose tenure is for life, and who make no commitment at the time of their appointment other than an oath or affirmation to support the Constitution? What a mockery this makes of the appointing process, as Professor Ernest Brown has recently reminded us.[20] President Wilson naming Justices Brandeis and McReynolds. President Eisenhower naming Justices Harlan and Whitaker, on the one hand, and Chief Justice Warren and Justice Brennan, on the other. President Kennedy choosing Justices White and Goldberg. Such inconsistent choices would be simply idiotic were there not a shared conviction that the Court is not a power organ, that it is a Court of law.

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[18] See, *e.g.*, Henry v. Mississippi, 379 U.S. 443 (1965); Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943 (1965).

[19] See 28 U.S.C. § 1443(1) (1958), deriving from Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27. The section has been narrowly construed, see Kentucky v. Powers, 201 U.S. 1 (1906); New York v. Galamison, 342 F.2d 255 (2d Cir. 1965). *But cf.* Rachel v. Georgia, 342 F.2d 336 (5th Cir. 1965).

The crucial question then becomes what special quality or qualities are called for in judicial action for that action to conform to the ideal of law?

The question is a simple one but surely it does not admit of any simple answer. Judges like to say, and they find comfort in declaring, that their judgments are determined by objective factors found within the legal system, not by a volition of their own. When they construe and apply written law, such as the Constitution or a statute, they give effect to the will of the enacting body, as that will has been manifested in the words of the enactment. When they are dealing with the common law, they follow precedents of earlier decisions, extended by analogy to novel situations, as new cases may arise. Within limits this is true and, when it is, we have an answer to our question. The judge finds and gives expression to a mandate others have laid down; he is not a law-maker himself but merely is the agent who gives voice to the existing law.

The difficulty is that such an answer involves only partial truth, as every lawyer and law student knows. The common law calls for a due regard to precedent; it also calls, however, for the reconciliation of conflicting lines of doctrine and, beyond that, deems legitimate the reconsideration and reworking of decisions of the past to serve new values and to meet emergent needs.[21] That is why the system has vitality and has survived.

There is a different but a comparable freedom when the courts apply the written law. A statute or a constitutional provision may, of course, be so explicit that minds cannot differ on the meaning of the words. The problem is presented when such clarity does not obtain—and this, of course, is the more frequent situation, especially in constitutional interpretation, since a constitution is so largely framed in generalities, precisely to permit its adaptation in a future that must largely be unknown. To ask what the Framers meant by "*the* freedom of speech" or "due process of law" or "unreasonable searches and seizures" or "equal protection of the laws" or "jeopardy of life or limb," as a guide to the decision of a concrete case, will often be to put a futile question. They stated a broad principle, illumined slightly, if at all, by legal history, a principle that inescapably demands interpretation, most importantly interpretation by the courts.

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[20] Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, 1963 SUPREME COURT REVIEW 1, 4.

[21] See, *e.g.*, LAW AND PHILOSOPHY 263-335 (Hook ed. 1964).

In this context, is there real meaning in the search for a distinctive legal quality in the judicial process of interpretation and of reinterpretation that has been and is so challenging a feature of our system through the years?

Judge Learned Hand, speaking in 1958, stated his considered view that there was not.[22] While he endorsed judicial review as a necessary function to avoid the collapse of our system, he confined judicial intervention to the situation where the language of the Constitution, read in the light of its "historical meaning" shows that the legislator or administrator or the State has transcended its authority. Conceiving the first amendment and the due process clauses of the fifth and the fourteenth, as well as the equal protection clause, to be "cast . . . in such sweeping terms that their history does not elucidate their contents," judgments of invalidity based on these provisions would, in his view, have been barred.[23] Such judgments, Judge Hand said, inevitably call upon the courts to function as "a third legislative chamber," opposing their own conceptions of competing values to those reflected in the challenged acts of legislation or administration.[24]

Called on to speak from the same rostrum the succeeding year, I made bold to differ with Judge Hand.[25] Believing that judicial review is itself established by the Constitution, in the sense I have described, I could not accept the proposition that the courts have a discretion to abstain or intervene when constitutional infringements are established in cases properly before them in the course of litigation. I argued further that the courts cannot escape the obligation of interpreting the open-ended concepts of the Constitution, framed as limitations upon government, even though the task does involve passing judgment upon action of the other branches, resting on a choice of values, as invariably action does. Finally, in answer to the point that such a function casts the courts in the role of a third legislative chamber, I urged that the vital and the saving difference is that judicial action "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[26] Granting that "the courts decide, or should decide, only the case they have before them" I suggested that they must "decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply."[27] This seemed to me to yield a middle ground between a judicial House of Lords and the abandonment of any limitation on the other branches—a middle ground consisting of judicial action that embodies what are surely the main qualities of law, its generality and its neutrality.

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[22] HAND, THE BILL OF RIGHTS (1958).

[23] *Id.* at 30.

[24] *Id.* at 55.

[25] See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted in PRINCIPLES, POLITICS & FUNDAMENTAL LAW 3 (1961).

[26] 73 HARV. L. REV. at 15.

My submission was, in short, that the distinctive legal element in an adjudication lies in its appeal to reason—reason stated in a principle fairly susceptible of general and neutral application, not what Shakespeare called a "woman's reason." The dialogue the Court initiates when it hands down a constitutional decision thus concerns the adequacy of the reasons it advances for the value choice that it decrees. No one can state a formula that will determine when such reasons are sufficient but surely there are things that can be said. The problem must be fairly stated and correctly analyzed in its relation to the language and the concepts of the Constitution, including the "postulates," as Chief Justice Hughes called them,[28] that lie behind the words. History must be weighed, though we must grant that it can rarely be decisive; and history must not be fabricated or re-written for the purposes of the decision. The course of previous adjudication on the same or on related issues asserts the normal claims of continuity, which certainly demand consideration. So too do changes that have taken place in life and law and the new problems that have thus emerged. From sources such as this, judgment must distill a principle that determines the case at hand and that is viable in respect of those other situations, now foreseeable, to which the logic of the principle demands that it apply.[29]

Issues of federalism, for example, such as those involved in the interpretation of the commerce clause, may not be made to turn on the material interest that is affected, be it that of labor or of management, producers or consumers, or whatever other interest is at bar. The relevant principles involve abstractions about the scope of national authority; they must do service in delineation of the governmental structure, whatever claims to power or advantages win political acceptance for the time.

Whether the fourteenth amendment should be read to outlaw race or color as determinants of all official action must be tested not alone by the effects of such a principle on state-required segregation, but also by its impact upon measures that take race into account to equalize job opportunity or to reduce *de facto* segregation, as in New York City schools.

In *Shelley v. Kraemer*,[30] the Supreme Court found racial discrimination by the State in a state court's enforcement of a racially restrictive covenant. The Court's opinion rested on the grounds that the covenant embodied a discrimination, as it did; and that the enforcement order of the Court was action of the State, as it was. But surely these grounds did not suffice to yield a principled decision. Why not? Because a judgment on such grounds involves the tacit affirmation that private discrimination becomes a discrimination by the State whenever it is legally enforced. But such a proposition is absurd and would destroy the law of wills and a good portion of the law of property, which is concerned precisely with supporting owners' rights to make discriminations that the State would not be free to make on the initiative of officials. As a legislative matter, there may well be ground for dealing specially with racially restrictive covenants as distinguished from other contracts or from other incidents of property. But the Supreme Court neither had nor claimed authority to reshape the law of contracts or of remedies. Its sole competence was to give meaning to a general provision forbidding a State of the United States to deny to any person in its jurisdiction the equal protection of the laws. Hence, if the enforcement of the contract charged the State with the owner's discrimination in the case of the covenant, the tenement owner's refusal to lease, the store owner's refusal to sell, the testator's discriminatory devise must equally become the action of the State if enforced by a state court.

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[27] *Ibid.*

[28] Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

[29] *Cf.* Henkin, *"Neutral Principles" and Future Cases*, in LAW AND PHILOSOPHY, *supra* note 21, at 301.

[30] 334 U.S. 1 (1948).

That is, indeed, precisely what was argued in the sit-in cases[31] prior to their disposition by reliance on the Act of Congress[32]—that a State discriminates if it enforces the general law of trespass against persons who have been excluded by an owner upon racial grounds. That proposition was rejected by three members of the Court, in the opinion of Mr. Justice Black;[33] the three who accepted it put their acceptance on special historical grounds;[34] and the three who were silent on the issue must have wished at least to give the matter further thought. Can there be any doubt, however, that the argument must be rejected if a principled delineation of the scope of action of the State, as that concept is employed in the amendment, is to guide the judgment of the Court? Did Mr. Justice Douglas advance a principle that can be given general effect without absurd results in arguing that if an enterprise is licensed by the State, its action is the action of the State within the meaning of the fourteenth amendment?[35]

Time being what it is, these illustrations must suffice to show the sense and purport of my theme. The principle of neutral principles does not purport to yield a formula that makes it easy to decide hard cases or dispenses with the agony of judgment in arriving at decisions—as Mr. MacDougal seemed to imply that it did when he was here. Nor does it, as Dean Rostow has averred, repudiate "all we have learned about law since Holmes published his Common Law in 1881."[36] Nor does it exclude value judgments from interpretation, as some others have alleged.[37] That an adjudication be supported or at least supportable in general and neutral terms is no more than a negative requirement. A decision does not satisfy the minimal conception of that "equal justice under law" to which we all profess to be devoted unless it is sustained by such a principle. If it does, and only if it does, must the other and the harder questions of its wisdom and its rightness be confronted. But minimal as the submission is, I do not hesitate to say that I believe it has a special relevancy and importance in our time. The Courts must respect this moral limit on their power or their power in the end will not survive.

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[31] See, *e.g.*, Bell v. Maryland, 378 U.S. 226 (1964).

[32] See Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

[33] Bell v. Maryland, 378 U.S. 226, 318 (1964).

[34] *Id.* at 286. *But cf.* Mr. Justice Douglas, *id.* at 259.

[35] See Garner v. Louisiana, 368 U.S. 157, 184 (1961); Lombard v. Louisiana, 373 U.S. 267, 281 (1963).

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[36] ROSTOW, THE SOVEREIGN PREROGATIVE 28 (1962).

[37] See, *e.g.*, Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660 (1963); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); B. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599 (1962).

# COMMENTARY

## CONGRESSIONAL CONTRACTION OF FEDERAL JURISDICTION

RAOUL BERGER

> *I am a lifelong liberal, poles removed from Senator Jesse Helms, and I am personally opposed to prayer in the schools. But I have never permitted my social aspirations to warp my commitment to the Constitution, or believed that the Court was empowered to revise the Constitution to conform to my desires. Back in 1942 I wrote that I liked it no more when Justice Black incorporated my predilections in the Constitution than when the Four Horsemen incorporated theirs. To reason that a result is desirable, and therefore it is constitutional, is wishful thinking.*
>
> *Raoul Berger*

The Helms Amendment,[1] recently passed by the Senate, would deprive the federal courts of jurisdiction to review state school prayer action.[2] Professor Lawrence Tribe reportedly "doubts the Supreme Court would 'tolerate it.' "[3] His Harvard colleague John Hart Ely wrote that "Congress' theoretical power to withdraw the Court's jurisdiction over certain classes of cases is so fraught with constitutional doubt that although talked about from time to time, it has not been invoked for over one hundred years."[4]

Perhaps the reason congressional power over the Court's jurisdiction has not been invoked more frequently is that the people have not understood that the Justices were imposing their own values rather than enforcing constitutional mandates.[5]

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[1] Helms Amendment, S. REP. No. 450, 96th Cong., 2nd Sess. 131 (1979).

[2] *Law Scope: Say Dormant Prayer Bill Has Broad Implications*, 66 A.B.A. J. 437 (1980).

[3] *Id.*

[4] J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 46 (1980). Impeachment of a President rusted for 100 years between Andrew Johnson and Richard Nixon.

[5] Professor Felix Frankfurter wrote President Franklin Roosevelt at the height of the Court-packing plan: "People have been taught to believe that when the Supreme

"Why," asks Professor G. Edward White, "should not the Court acknowledge that the source of newly invented rights is not the Constitution but the enhanced seriousness of certain values in our society?"[6] Certainly the Court's emasculation of death penalties, for example, does not reflect any "shared values,"[7] if we may judge by the subsequent "stampede of state reenactments of the death penalty," evidencing "the clarity of that community reaction."[8] Widespread resistance to busing similarly testifies that the Court's values are not those of the people. One is reminded of Robespierre's insistence that "[i]f Frenchmen would not be free and virtuous voluntarily then he would force them to be free and cram virtue down their throats."[9] Against this "disposition of mankind . . . to impose their own opinion . . . as a rule of conduct on others," John Stuart Mill warned, nothing would restrain but "want of power."[10] The Helms Amendment would give effect to that caution.

Viewed in historical perspective, the Helms Amendment

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Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution. And I verily believe that that is what the country needs most to understand." Roosevelt and Frankfurter: Their Correspondence, 1928-1945, at 383 (M. Freedman ed. 1967). To the same effect is Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind.L.J. 1, 3-4 (1971).

[6] White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 Judicature 162, 168 (1979). That many of these judicial "values" are highly unpopular has been documented by others. For citations see R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 325-28 (1977). As Professor Joseph W. Bishop wrote, "Those who favor abortion, busing . . . and oppose capital punishment . . . obviously have no faith whatever in the wisdom or will of the great majority of people who are opposed to them." Bishop, *What is a Liberal—Who is a Conservative*, 62 Commentary 47 (1976).

[7] Ely has demonstrated that a divorce between a judge's personal values and the social consensus is delusory—that what he is really discovering "are his own values." Ely, *Foreword: On Discovering Fundamental Values*, 92 Harv.L.Rev. 5, 16 (1979). Ely notes that "Lenin used to claim this godlike divination of the people's 'real interests.'" *Id.* at 51 n.198. Professor Mark Tushnet points out that "the fragmentation of American society makes it impossible to support the view that a single set of intuitions is pervasively shared. . . ." Tushnet, *Truth, Justice and the American Way: An Interpretation of the Public Law Scholarship in the Seventies*, 57 Tex.L.Rev. 1307, 1320 (1979). Professor Gary Leedes also comments on the absence of "shared values." Leedes, *The Supreme Court Mess*, 57 Tex.L.Rev. 1361, 1444 (1979).

[8] Ely, *supra* note 4, at 65.

[9] 2 C. Brinton, S. Christopher & R. Wolff, A History of Civilization 115 (1955). Englishmen learned from the Protectorate, wrote W.H. Auden, that "the claims of self-appointed saints to know by divine inspiration what the good life should be and to have the right to impose their notions on the ungodly could be as great a threat as the divine right of kings." Auden, *Foreword* to Selected Writings of Sidney Smith at xvi (W. Auden ed. 1956).

[10] J.S. Mill, On Liberty 28 (1885).

merely seeks to restore self-rule to the states with respect to school prayers—an autonomy reserved to the states from the very beginning. When Justice Jackson appealed to the First Amendment in the *Flag Salute Case*,[11] he did not notice that Madison's proposed Bill of Rights recommended that "*No State* shall violate the equal rights of conscience, or the freedom of the press." This, Madison urged, was "the most valuable amendment in the whole list."[12] Madison's version of the amendment prevailed in the House but was rejected by the Senate.[13] Thus, the one time the American people had an opportunity to express themselves on the subject they voted down interference with state control in matters of religion.[14]

There is no need to recanvass the evidence that the framers of the Fourteenth Amendment did not mean to incorporate the Bill of Rights and thereby to reverse that earlier verdict by the Congress.[15] The framers of that amendment left no doubt that their objectives were quite narrow—excluding, for example, suffrage and segregation.[16] Elsewhere I have demonstrated that the

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[11] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

[12] 1 ANNALS OF CONGRESS 434, 755 (Gales & Seaton eds. 1836)(print bearing running title "History of Congress") (emphasis added).

[13] Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV.L.REV. 431, 434-35 (1926).

[14] Judge Learned Hand has written that the judge "has no right to divination of public opinion which runs counter to its last formal expression." L. HAND, THE SPIRIT OF LIBERTY 14 (1952).

[15] For citations to Charles Fairman's documented rejection of the argument that the Bill of Rights was incorporated in the Fourteenth Amendment, *see* BERGER, *supra* note 6, at 137; and *see id.* at 134-56 for supporting data. Alexander Bickel concluded that the "weight of opinion among disinterested observers" is that Fairman "conclusively disproved" the argument. A. BICKEL, THE LEAST DANGEROUS BRANCH 102 (1962). An activist, Professor Dean Alfange, wrote, "[I]t is all but certain that the Fourteenth Amendment was not intended to incorporate the Bill of Rights." Alfange, *Essay-Review*, 6 HASTINGS CONST.L.Q. 603, 607 (1979).

Striking confirmation is furnished by an amendment proposed by James Blaine in 1875, in a Congress which included twenty-three members of the 39th Congress—Blaine among them. Prior thereto he had written a letter published by the *New York Times* indicating that the Fourteenth Amendment did not forbid states from establishing official churches or maintaining sectarian schools. Consequently he proposed that "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."

> Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified seven years earlier. . . . Remarks of Randolph, Christiancy, Kernan, White, Bogy, Eaton and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.

F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 116 (1958).

[16] *See* note 34 *infra*.

Court's transformation of the Fourteenth Amendment represents a manifest usurpation of power,[17] to defend which a perfervid activist, Professor Paul Brest, has been driven to proclaim that the Court is not bound by the Constitution.[18] Professor Lusky, an admirer of the Court's "assertion of the power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by Article V," wrote in 1979 that "the voters, if aroused to indignant resistance against perceived usurpation, can and surely will cause their delegates to strip away virtually all powers of the federal courts to engage in judicial review."[19] The Helms Amendment seeks only to restore state control of school prayer, exactly as the Founders intended. Is Congress empowered to do so?

Very early in our history the Court held in *Cary v. Curtis*[20] that

> the judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution . . . entirely upon the action of Congress, who possess the sole power . . . of investing [the inferior courts] with jurisdiction . . . and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.[21]

"Not until 1875," wrote Professor Charles Alan Wright, "was there a general grant of federal question jurisdiction; such cases could only be brought in the State courts."[22] And what Congress delegates Congress can withdraw.[23] A withdrawal of jurisdiction, for example, over busing or death penalty cases from the federal courts would dry up one source of appeals to the Supreme Court.

As to the state courts, Professor Wright has written, Congress from the beginning has "provided that in certain instances the jurisdiction of the federal courts shall be exclusive of the courts of the several States. . . ."[24] One such instance is the provision of § 3 of the Civil Rights Act of 1866 that "the District Courts . . . shall have, *exclusively* of the Courts of the several States, cognizance of the crimes and offenses committed against the provisions of this Act."[25] Such precedents are reinforced by § 5 of the Fourteenth Amendment—"*Congress* shall have power to enforce" the provisions of the Amendment.[26] Were the state courts to proceed in spite of an "exclusivity" provision, they would take over power confided to Congress. If neither state nor federal courts may by virtue of congressional enactment determine certain categories of cases, then there is no basis for appeals to the Supreme Court.

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[17] BERGER, *supra* note 6. Professor Philip Kurland wrote that "the most immediate constitutional crisis" of our time is "the usurpation by the judiciary of general government on the pretext that its authority derives from the Fourteenth Amendment." Letter from Philip Kurland to Harvard University Press (August 15, 1977).

[18] Brest challenges the assumption "that judges and other public servants are bound by the text or original understanding of the Constitution." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224 (1980). Brest now concedes that the "adopters of the equal protection clause probably intended it not to encompass voting discrimination at all." *Id.* at 234 n.115.

[19] Lusky, *Essay-Review*, 6 HASTINGS CONST.L.Q. 403, 406, 412 (1979). To the same effect is Leedes, *supra* note 7, at 1442, 1443.

[20] 44 U.S. (3 How.) 236 (1845). *See also* Lockerty v. Phillips, 319 U.S. 182 (1943).

[21] *Id.* at 245.

[22] C. WRIGHT, FEDERAL COURTS 4 (1963).

[23] Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

For the moment, let us defer the issue of due process and consider the appellate jurisdiction of the Supreme Court in light of the Article III provision that the appellate jurisdiction shall be subject to such "exceptions and . . . such regulations as Congress shall make."[27] Although the Court's appellate powers "are given by the Constitution," Chief Justice Marshall held, "they are limited and regulated by the judicial act [of 1789] and by such others as have been passed on the subject."[28] Citing Marshall in 1881, Chief Justice Waite declared, "What those [appellate] powers shall be, and to what extent they shall be exercised are, and always have been, proper subjects of legislative control . . . [W]hole classes of cases [may] be kept out of the jurisdiction altogether."[29] And in 1965, Professor Herbert Wechsler, the leading authority in the field, declared that "Congress has the power by its enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction."[30]

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[24] Wright, *supra* note 22, at 22. *See also* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1314-15 (1975) ("As a general matter, Congress may restrict the jurisdiction of, and remedies available in, the lower courts and may similarly restrict state courts in matters of federal concern").

[25] Civil Rights Act, 14 Stat. 27 (1866) (emphasis added).

[26] U.S. CONST. amend. XIV, § 5 (emphasis added).

[27] U.S. CONST. art. III, § 2.

[28] Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810). Brest wrote, "The Supreme Court confirmed the breadth of congressional power to control its appellate jurisdiction in the dramatic circumstances of Ex parte McCardle, 74 U.S. (7 Wall.) 506." BREST, *supra* note 23, at 1325. *McCardle* was approved in passing in Glidden v. Zdanok, 370 U.S. 530, 567 (1962). For additional discussion, *see* R. BERGER, CONGRESS v. THE SUPREME COURT 1-2 (1969).

[29] The Francis White, 106 U.S. 381, 396 (1881). For an attempt to distinguish an array of such cases, *see* Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U.PA.L.REV. 157, 173-84 (1960).

My practice of looking to the legislative history led me in 1969 to consult the records of the several Conventions to determine the scope of this Article III "exceptions" clause. There I found that the Founders merely intended by that clause to prevent the Court from revising the findings of a jury.[31] But my research met with little enthusiasm in academe.[32] Nevertheless, I would not renounce the legislative history, for I cling to the age-old canon: "The intention of the lawmaker is the law."[33] If, however, the "intention" is to govern, one must be even-handed — effect must also be given to the intention of the framers of the Fourteenth Amendment. Justice Harlan's demonstration that the framers of that Amendment excluded suffrage therefrom, wrote Lusky, is "irrefutable and unrefuted." Others concur and regard similar proof respecting segregation as "conclusive."[34] Those who, like Paul Brest, cite my history of the "exceptions" clause,[35] reject resort to the even clearer history of the Fourteenth Amendment:

> Many scholars and judges reject Berger's major premise, that constitutional interpretation should depend chiefly on the intent of those who favored and adopted a provision. . . . [W]hatever the framers' expectation may have been, broad constitutional guarantees require the Court to discern, articulate and apply values that are widely and deeply held by our society. . . .[36]

Brest and his fellow activists cannot have it both ways. Having rejected reliance on "the framers' expectation" in interpreting the Fourteenth Amendment, they cannot well complain if Congress chooses to give effect to the "plain meaning" of Article III, particularly in order to effectuate "values that are widely and deeply held by our society"—*e.g.*, death penalties. *"The most important datum,"* Ely stresses, *"bearing on what was intended is the constitutional language itself."*[37]

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[30] Wechsler, *The Courts and the Constitution*, 65 Colum.L.Rev. 1001, 1005 (1965).

[31] Berger, *supra* note 27, at 285-96.

[32] *E.g.*, G. Gunther & N. Dowling, Constitutional Law 53 (8th ed. 1970).

[33] Hawaii v. Mankichi, 190 U.S. 197, 212 (1903).

[34] For citations, *see* Berger, *"Government by Judiciary": Judge Gibbons' Argument Ad Hominem*, 59 B.U.L.Rev. 783, 791 (1979); and Berger, *supra* note 6, at 52-98, 117-33. Brest acknowledges that "the adopters of the equal protection clause probably intended it not to encompass voting discrimination at all." Brest, *supra* note 18, at 234 n.115.

[35] Brest, *supra* note 23, at 1329.

[36] Brest, *Book Review*, N.Y. Times, Dec. 11, 1977, Book Rev. Sec., at 11, 44. Brest's "beloved mentor," Justice Harlan, to whom Brest's casebook, *supra* note 23, is dedicated, held, "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect." Oregon v. Mitchell, 400 U.S. 112, 202-03 (1970) (Harlan, J., dissenting in part).

Even so, my argument need not rest on the "plain meaning" of the Article III "exceptions" clause. Consider the effect of § 5 of the Fourteenth Amendment, inasmuch as it is through the medium of the Fourteenth Amendment that the Court has made the "religion" clauses of the First Amendment applicable to the States.[38] Section 5 provides, *"Congress* shall have power to enforce . . . the provisions of this article."[39] Giving effect to the negative pregnant, the Court itself emphasized in *Ex parte Virginia* that this power was given to Congress, not the courts.[40] Judicial enforcement against the will of Congress would convert "Congress shall" into "the Court shall." Such a conversion would usurp power withheld. For discretion to enforce was left to Congress; § 5 does not mandate enforcement; it does not provide that "Congress *shall* enforce," but rather that "Congress *shall have power* to enforce."[41] The wording responded to deep-

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[37] Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND.L.J. 349, 418 (1978) (emphasis in original). And Ely adds, "the only reliable evidence of what 'the ratifiers' thought they were ratifying is obviously the language of the provision they approved." *Id.* at 419.

[38] *Supra* note 11.

[39] U.S. CONST. amend. XIV, § 5 (emphasis added).

[40] 100 U.S. 339 (1879).

> It is not said that the judicial power of the general government shall extend to enforcing the prohibitions and protecting the rights and immunities guaranteed . . . It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendment fully effective.

*Id.* at 345. Justice Black, dissenting in Harper v. Virginia Bd. of Educ., 383 U.S. 663, 678 (1966), said, citing *Ex parte Virginia*, "[T]he people, in § 5 of the Fourteenth Amendment designated the governmental tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of the Government they chose was not the Judicial Branch but the Legislative." *See also* BERGER, *supra* note 6, at 221-29.

[41] U.S. CONST. amend. XIV, § 5 (emphasis added). Referring to the § 5 "authority to 'enforce,'" Justice Douglas, in Katzenbach v. Morgan, 384 U.S. 641, 647 (1970) (separate opinion), declared that "[t]he manner of enforcement involves discretion; but that discretion is largely entrusted to Congress, not to the courts."

Justice James Iredell, one of the foremost advocates of judicial review prior to 1787, declared that under "authority given" the "legislatures only exercise a discretion expressly confided to them by the constitution. It is a discretion no more controllable (as I conceive) by a court of justice, than a judicial determination by them." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 266 (1796). Judicial review, Judge Learned Hand stated, "should be seated distrust of the Court in the wake of *Dred Scott* and the Fugitive Slave decisions;[42] hence the "shall have power" formula designedly left the decision to enforce in the hands of Congress. To quote only Senator Jacob Howard, section 5

> constitutes a direct affirmative delegation of power to Congress to carry out all the principles of these guarantees, a power not found in the Constitution . . . It casts upon Congress the responsibility of seeing to it, for the future, that all sections of the amendment are carried out in good faith . . . I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty.[43]

This interpretation is confirmed by the history of the Fifteenth Amendment. Section 2 of the Fifteenth Amendment is the analogue of § 5 of the Fourteenth. In the words of Senator Oliver Morton, a framer of the Fourteenth Amendment, "the remedy for both" the Fourteenth and Fifteenth Amendments "was *expressly not left to the courts*," but was to "be enforced by legislation on the part of Congress."[44] Senator John Sherman stated that "*before* it shall be enforced in the courts some legislation should be passed by Congress."[45] Senator Matthew Carpenter said, "We must legislate and *then commit* the enforcement of our laws to the federal tribunals."[46] What Congress "commits" it can withdraw,[47] just as in the case of the "inferior

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confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised.' L. HAND, THE BILL OF RIGHTS 66 (1962). *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-70 (1803); Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840).

[42] *For citations see* BERGER, *supra* note 6, at 222; *see also* Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW.U.L.REV. 311, 350-51 (1979).

[43] Cong. Globe, 39th Cong., 1st Sess. 2766, 2768. *See also* BERGER, *supra* note 6, at 190, 222-28; BERGER, *supra* note 42, at 350-51. Charles Fairman comments that Thaddeus Stevens proposed "All laws . . . shall operate impartially and equally." This proposal "would work by its own force; courts would be bound to disregard invidious laws. Not so Bingham's [proposal: "The Congress shall have power to make all laws necessary . . ."]. *Congress* would be empowered—yet nothing would result save as it legislated, and anything that was enacted could be repealed." C. FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1271 (1971). Senator Luke E. Poland of Vermont, "like the rest, contemplated action by Congress and ignored direct enforcement by the courts." *Id.* at 1296.

[44] Cong. Globe, 42d Cong., 2d Sess. 525 (1872) (emphasis added). *See also* note 34 *supra*.

[45] Cong. Globe, 41st Cong., 2d Sess. 577 (1870) (emphasis added). For other citations, *see* Berger, *supra* note 42, at 351-52.

[46] Cong. Globe, 42d Cong., 1st Sess. 577 (1871).

[47] Apparently Professor Archibald Cox has arrived at the same conclusion:

> Under section five of the Fourteenth Amendment Congress has wide power to frame legislation to protect constitutional rights. . . . Congress, therefore . . . could artic-

courts" jurisdiction.[48] Nowhere was it intimated that the Supreme Court was exempted from the grant of power to Congress. In fact, § 5 responded to the enduring distrust its *Dred Scott* decision had engendered.

Finally, does the due process clause require that a remedy be provided, on the theory that no one may be deprived of a right without trial? Before I studied the effect of § 5 I thought so.[49] But did the framers intend the due process clause of § 1 to take precedence over § 5? The due process clause is one of the "provisions" that "Congress shall have power to enforce." Consequently even the due process clause comes into play only after Congress exercises that "power" and "commits" to the courts enforcement of the clause. To require a judicial trial against the will of Congress would be to take over power granted to Congress alone, depriving § 5 of its intended effect. In sum, the due process clause is subordinate to § 5, for the framers left it in the discretion of Congress whether to provide an enforcement procedure. Moreover, there is the rule, going back to Puffendorf, that as between conflicting provisions in the same enactment the last in order of arrangement will control.[50]

The ongoing debate about the scope of judicial review[51] would be pointless if there existed no machinery to correct judicial usurpation.[52] Those who do not share Paul Brest's belief that the Court is not bound by the Constitution, who consider that revision of the Constitution was confided to the people, not the Court, should welcome the exercise of congressional power to restore the democratic system of self-government.

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> ulate minimum protection standards and *delegate* further particularization and refinement *to a legislative court* or administrative agency.

Cox, *The Effect of the Search for Equality Upon Judicial Institutions*, 1979 Wash.U.L.Q. 795, 815-16 (emphasis added).

So too Professor John Hart Ely wrote, "As far as the Fourteenth Amendment is concerned, it is true that the (misplaced) anticipation seems to have been that it would receive its most meaningful enforcement by Congress, acting under Section 5, rather than by the courts." J. Ely, Democracy and Distrust: A Theory of Judicial Review 40 (1980).

[48] *See* text accompanying notes 20-22 *supra*.

[49] Berger, *supra* note 27, at 296.

[50] United States v. Jackson, 143 F. 783, 787 (9th Cir. 1906); *In re* Richards, 96 F. 935, 939 (7th Cir. 1899); United States v. Updike, 25 F.2d 746 (D.Neb. 1928).

[51] For comments on that debate, see Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule*, 31 S.C.L.Rev. 617 (1980); Perry, *Essay-Review*, 78 Colum. L. Rev. 685 (1978).

[52] Activists who excuse judicial "adaptation" of the Constitution on the ground that the amendment process is "cumbersome"—as if that excuses compliance with the law—cannot well insist that correction of judicial abuses proceed by that same "cumbersome" process.

## NOTE ON THE POWER OF CONGRESS TO LIMIT THE JURISDICTION OF FEDERAL COURTS

### A. The Thesis that Congress Is Obliged to Vest Full Jurisdiction in the Federal Courts

The view that Article III casts an obligation on the Congress to endow federal courts with the full scope of federal judicial power was rejected in the framing of the First Judiciary Act. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49 (1923). It was reiterated nonetheless by Justice Story in the opinion of the Court in Martin v. Hunter's Lessee, 1 Wheat. 304 (U.S.1816):

> "* * * The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. Could congress have lawfully refused to create a supreme court, or to vest in it the constitutional jurisdiction? * * *
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> "If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which congress are bound to act in preference to others.
>
> "The next consideration is, as to the courts in which the judicial power shall be vested. It is manifest, that a supreme court must be established; but whether it is equally obligatory to establish inferior courts, is a question of some difficulty. If congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases, the judicial power could nowhere exist. * * * Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself; and if in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction, the appellate jurisdiction of the supreme court (admitting that it could act on state courts) could not reach those cases, and consequently, the injunction of the constitution, that the judicial power *'shall be vested'*, would be disobeyed. It would seem, therefore, to follow, that congress are bound to create some

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judication in Mississippi v. Johnson, 4 Wall. 475 (U.S.1867) and Georgia v. Stanton, 6 Wall. 50 (U.S.1867), but the affirmation of jurisdiction when Ex parte McCardle reached the Court (6 Wall. 324) suggested that adverse decision was at hand. The Act withdrawing jurisdiction, though successful to frustrate decision in McCardle's case, was later held to leave intact the power to review denial of the writ on a petition in the Supreme Court for habeas corpus and certiorari. Ex parte Yerger, 8 Wall. 85 (U.S.1868). Decision on the merits was again prevented, however, this time by releasing Yerger from the challenged military custody. See 2 Warren, *supra*, at 496–97.

See also the splendid account of the McCardle case in the recently published Fairman, Reconstruction and Reunion, 1864–88, Part One, ch. X (1971). (This is Volume VI of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States.)

inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority.

"This construction will be fortified by an attentive examination of the second section of the third article. The words are 'the judicial power *shall extend,'* &c. Much minute and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words 'may extend,' and that 'extend' means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion that the words are used in an imperative sense; they import an absolute grant of judicial power."

Quoting these dicta in 3 Commentaries on the Constitution 449 (1833), Story added: "If congress possess any discretion on this subject, it is obvious, that the judiciary, as a co-ordinate department of the government, may, at the will of congress, be annihilated, or stripped of all its important jurisdiction; for, if the discretion exists, no one can say in what manner, or at what time, or under what circumstances it may, or ought to be exercised. The whole argument, upon which such an interpretation has been attempted to be maintained, is that the language of the constitution, 'shall be vested,' is not imperative, but simply indicates the future tense. This interpretation has been overruled by the Supreme Court, upon solemn deliberation" (citing Martin v. Hunter's Lessee).

Is Justice Story's position consistent with the deliberate compromises of the Constitutional Convention? See pp. 11–12, *supra.*

Would Story have dissented in the Sheldon or McCardle cases? White v. Fenner, 1 Mason 520, Fed.Cas.No. 17,547 (C.C.R.I., 1818), indicates he did not consider the constitutional imperative to be self-executing. While declaring "it is somewhat singular the jurisdiction actually conferred on the courts of the United States should have stopped so far short of the constitutional extent", he dismissed a diversity suit excluded from the statutory grant, holding that the "Court has no jurisdiction which is not given by some statute". Does this mean that the dicta resulting from "solemn deliberation" in the Martin case were designed only to provide a basis for appeal to Congress?[2]

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[2] Evidence that Story's position as expressed in the Martin case should not be taken literally comes also from his writings as a legislative lobbyist at the time of Martin, urging Congress to widen the jurisdiction of the federal courts to encompass the whole of the Constitutional grant. See Gunther & Dowling, Cases and Materials on Constitutional Law 57–58 (8th ed. 1970).

Compare to Story's argument the narrower thesis of his friend and protegé, the court reporter Henry Wheaton, in a series of articles (signed "A Federalist of 1789") defending the Martin decision and Cohens v. Virginia, see p. 455, *infra*, published in *The New York American* in July and August, 1821. Wheaton, justifying Supreme Court power to review federal question cases decided by the state courts, argued that the Constitution does create a mandatory duty on Congress to extend the federal judicial power to *all* cases "arising under" federal law. He acknowledged that Congress has power not to create lower federal courts at all, or, having created them, not to vest them with original jurisdiction over all such cases. Precisely be-

Notice that a state court judgment in an action by Sill against Sheldon would not have been reviewable in the Supreme Court. Is this material?[3] Would Congress have power to authorize Supreme Court review of state decisions in diversity cases?

## B. The Klein Case

In United States v. Klein, 13 Wall. 128 (U.S.1872), plaintiff was the administrator of the deceased owner of property sold by agents of the government during the Civil War. He sued for the proceeds of such sale and recovered judgment in the Court of Claims, under legislation according such a right of action to noncombatant rebel owners upon proof of loyalty. The Supreme Court had previously held that loyalty could be proved in such cases by a Presidential pardon, and recovery was had upon this basis. Pending appeal from the judgment by the United States, Congress passed an act providing in effect that no pardon should be admissible as proof of loyalty and, further, that acceptance without written protest or disclaimer of a pardon reciting that the claimant took part in or supported the rebellion should be conclusive evidence of his disloyalty. The statute directed the Court of Claims and the Supreme Court to dismiss for want of *jurisdiction* any pending claims based on a pardon.

The Supreme Court held the supervening statute to be unconstitutional and affirmed the judgment of the Court of Claims. It found two vices in the statute: (1) that in forbidding the court "to give the effect to evidence which, in its own judgment, such evidence should have" and directing the court "to give it an effect precisely contrary," "Congress has inadvertently passed the limit which separates the legislative from the judicial power"; and (2) that the "rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive" (p. 147).

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cause of that power, he argued, Congress must, to comply with its constitutional duty, confer on the Supreme Court *appellate* jurisdiction over all such cases: "* * * so far as Congress may constitutionally restrain *original* jurisdiction as to such cases, they must give that which is *appellate:* and appellate jurisdiction where there is no original federal jurisdiction, must, of course, be exercised on the judgment of the state courts * * *". See *The New York American*, Aug. 3, 1821 (emphasis in original).

Wheaton does not appear to have adverted in this connection to the "with such exceptions" clause of Article III, Sec. 2. Nor does he advert to the fact that the governing Judiciary Act of the time gave the Supreme Court appellate jurisdiction over state court judgments, not in all federal question cases, but only where the state court ruling was unfavorable to a claim of federal right. See Chap. V, p. 439, *infra.*

The identification of Wheaton as the author of these articles is made by Professor Gerald Gunther in his forthcoming volume, The Struggle for Nationalism: The Marshall Court, 1815–25, to be Volume III of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States.

[3] In Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898), the defendants in an action to quiet title in a federal circuit court pleaded in bar a prior judgment of a state court. The judgment had been secured in an action by the state (under whom the defendants claimed) in an action against the present plaintiffs, who were citizens of other states. The present plaintiffs claimed that the judgment was void because the state's action, although within the original jurisdiction of the Supreme Court, was not removable to a federal circuit court nor was the judgment of the state court in the exercise of its concurrent jurisdiction reviewable in the Supreme Court. This contention was rejected.

In his dissenting opinion in Glidden Co. v. Zdanok, p. 395, n. 11, *infra*, Justice Douglas suggests that Klein is in principle inconsistent with McCardle. Is it? Simply because Klein invalidated a statute providing that cases of this type should be dismissed for want of jurisdiction? But does this not ignore some crucial distinctions? Does Klein in fact do more than hold that Congress intrudes on the judicial function by assuming to prescribe how the Court should decide an issue of fact (under threat of loss of jurisdiction)? And that it is also an unconstitutional invasion of the judicial function when Congress purports, not to withdraw jurisdiction completely, but to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds? On both these points the holding is clearly correct, is it not? See Tot v. United States, 319 U.S. 463 (1943); *cf.* Yakus v. United States, p. 320, *infra*, and the Dialogue at pp. 336–44, *infra.*[4]

## C. The Norris-LaGuardia Act

The Norris-LaGuardia Act of March 23, 1932, 29 U.S.C. §§ 101–115, narrowly restricted the authority of courts of the United States to issue a restraining order or a temporary or permanent injunction in "a case involving or growing out of a labor dispute", and provided that "yellow-dog" contracts "shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court". The term "court of the United States" was defined to mean "any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress". The Act throughout was drawn as a limitation of the "jurisdiction" of the courts.

At the time of the enactment, Truax v. Corrigan, 257 U.S. 312 (1921), had found state legislation similarly limiting employers' remedies to be a denial of due process; and Coppage v. Kansas, 236 U.S. 1 (1915), and Adair v. United States, 208 U.S. 161 (1908), had held that the right to condition employment on an undertaking not to join a labor union or on non-membership also was protected by the due process clauses of the Constitution.

Did the fact that the Norris-LaGuardia Act, as interpreted, merely limited federal jurisdiction render these due process arguments (whatever their validity) irrelevant? This was the view of the reports of the Judiciary Committees. S.Rep.No.163, H.R.Rep.No.669, 72d Cong., 1st Sess. 10 (1932).

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[4] Klein contains some broad language questioning the power of Congress to "prescribe rules of decision to the Judicial Department of the government in cases pending before it" (p. 146). Given the context such language should surely not be read as casting doubt on the ancient principle, clear since the decision in United States v. The Schooner Peggy, 1 Cranch 103 (U.S. 1801), that the courts are obligated to apply law (otherwise valid) as they find it at the time of final judgment, including, when a case is on review, the time of the appellate judgment. See, *e. g.*, Carpenter v. Wabash Ry., 309 U.S. 23 (1940); Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); Huddleston v. Dwyer, 322 U.S. 232 (1944). *Cf.* Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (Congress may provide for the abatement of state criminal proceedings for offenses committed *prior* to federal legislation making the relevant conduct lawful). In fact the Supreme Court has, on timely motion, modified its own judgment to permit consideration by the district court of a defense created by Act of Congress passed after entry of the judgment. See 149 Madison Ave. Corp. v. Asselta, 331 U.S. 795 (1947), modifying 331 U.S. 199 (1947); for subsequent proceedings, see 79 F.Supp. 413 (S.D. N.Y.1948), 90 F.Supp. 442 (S.D.N.Y. 1950).

See also Frankfurter & Greene, The Labor Injunction 210–11 (1930), and the memorandum by Professor Frankfurter in the Appendix to H.R.Rep. No.669, *supra*. The position was apparently sustained by the Supreme Court in Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938), Justice Roberts saying: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." [5]

Is it fair to say that the theory of the legislation was that the Constitution may impose more stringent limitations on state power to restrict state court jurisdiction than on federal power to restrict federal jurisdiction? Does this make sense?

### D. The Price Control Legislation

In the Sheldon case, limitation of federal jurisdiction left the plaintiff free to sue in a state court. So, too, the Norris-LaGuardia Act, though much copied by the states, did not seek to limit the jurisdiction of state courts.[6] When an Act of Congress does purport to limit state as well as federal court jurisdiction, does its validity depend upon a different constitutional standard?

(1) The Emergency Price Control Act of 1942, 56 Stat. 23, created "a court of the United States to be known as the Emergency Court of Appeals," to consist of three Federal District or Circuit Judges, and having "the powers of a district court with respect to the jurisdiction conferred on it" by the Act, except that it had no power to issue any temporary restraining order or interlocutory decree staying the effectiveness of any order, regulation or price schedule issued under the Act. Section 203(a) provided for attack on any order, regulation or price schedule issued under the Act by filing a protest with the Administrator;[7] if the protest was denied, Section 204(a) gave the party aggrieved thirty days to file a complaint with the Emergency Court of Appeals. Section 204(d) provided that the judgments of that court could be reviewed by the Supreme Court on petition for writ of certiorari, with a direction that these cases be expedited.

Section 204(d) also provided:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

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[5] For other limitations on the power of federal courts to grant injunctions, see Chap. VII, Sec. 3(b), (c), and Chap. VIII, Sec. 5, *infra*; see also the *Note on Judicial Review in Selective Service Cases*, p. 365, *infra*.

The impact of Norris-LaGuardia has been significantly narrowed by the holdings that it does not prevent federal-court injunctions to enforce no-strike clauses in collective bargaining agreements under Section 301 of the Taft Hartley Act, see Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970) (overruling a holding to the contrary in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962)), or to enforce legal obligations created by the Railway Labor Act, see, *e. g.*, Chicago & N. W. Ry. v. United Transp. Union, 402 U.S. 570 (1971), and Brotherhood of Railroad Trainmen v. Chicago River & I. R. R., 353 U.S. 30 (1957).

[6] Note, however, that Norris-LaGuardia would seem to come into operation again in a case where the defendant is allowed to (and in fact does) remove the case from state to federal court under 28 U.S.C. § 1441. See Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968), discussed at pp. 1200–01, *infra*.

[7] As originally enacted, the statute required such a protest to be filed within 60 days after the issuance of the regulation or after the grounds of protest had arisen, but this time limit was removed in the Stabilization Extension Act of June 30, 1944, 58 Stat. 632.

Section 205 authorized the Administrator to bring suit for an injunction restraining violations of the Act or an order directing compliance; declared wilful violations criminal; and authorized treble damage suits in case of over-ceiling sales to be brought by a buyer for use and consumption or, in other cases, by the Administrator. Concurrent jurisdiction was conferred upon state courts, except in criminal prosecutions.

As originally enacted, the statute made no provision for a stay of enforcement proceedings either to permit the filing of a protest or to await the disposition of a protest previously filed. The Stabilization Extension Act of June 30, 1944, 58 Stat. 632, however, added a new Section 204(e), which directed a stay of enforcement suits pending action on a protest already filed or review of its denial; it also gave a narrow scope for stays in certain cases to permit suits to be filed in the Emergency Court of Appeals where no protest had been filed.

(2) Lockerty v. Phillips, 319 U.S. 182 (1943), involved a suit by wholesale meat dealers in a federal district court in New Jersey to restrain the United States Attorney from prosecuting violations of certain price regulations. The regulations and the Act were challenged on constitutional grounds.

The district court dismissed the suit for want of jurisdiction under § 204(d). The Supreme Court affirmed, Chief Justice Stone saying (pp. 187–89):

"By this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1 of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. Kline v. Burke Construction Co., 260 U.S. 226, 234, and cases cited; McIntire v. Wood, 7 Cranch 504, 506. The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' Cary v. Curtis, 3 How. 236, 245; Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330; Hallowell v. Commons, 239 U.S. 506, 509; Smallwood v. Gallardo, 275 U.S. 56; Toucey v. New York Life Ins. Co., 314 U.S. 118, 129. See also United States v. Hudson and Goodwin, 7 Cranch 32, 33; Mayor v. Cooper, 6 Wall. 247, 252; Stevenson v. Fain, 195 U.S. 165, 167; Kentucky v. Powers, 201 U.S. 1, 24; Chicot County Drainage Dist. v. Baxter Bank, 308 U.S. 371, 376. In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court. Nor can we doubt the authority of Congress to require that a plaintiff seeking such equitable relief resort to the Emergency Court only after pursuing the prescribed administrative procedure. * * *

"Appellants also contend that the review in the Emergency Court is inadequate to protect their constitutional rights, and that § 204 is therefore unconstitutional, because § 204(c) prohibits all interlocutory relief by that court. We need not pass upon the constitutionality of this restriction. For, in any event, the separability clause of § 303 of the Act would require us to give effect to the other provisions of § 204, including that withholding from the district courts authority to enjoin enforcement of the Act—a provision which as we have seen is subject to no constitutional infirmity.

"Since appellants seek only an injunction which the district court is without authority to give, their bill of complaint was rightly dismissed. We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it."

(3) In what court should the plaintiffs in Lockerty have attempted to test the constitutionality, under the due process clause, of the complete prohibition on interlocutory relief in the Act? Given the fact that the jurisdiction of the Emergency Court was itself explicitly defined as not inluding the power to grant such relief, would their position have been stronger there than it was in the district court? What about applying for an interlocutory injunction in a state court? As the Dialogue below suggests, see pp. 359–60, *infra,* it should be clear in principle that a state court of general jurisdiction cannot be prevented from passing on the constitutionality of any restriction placed on its jurisdiction by the Congress. (As a practical matter, plaintiffs would have faced formidable obstacles to persuading a state court to pass on the question in light of the confusion surrounding the question of state-court power over suits against federal officers, see pp. 427–31, *infra.*) But if a state court would be under an obligation to pass on the validity of the remedial restriction in spite of the Act's provision completely withdrawing jurisdiction from state as well as federal courts, could Congress have conceivably meant the separability clause to deny a similar authority to the federal district courts? In any event does not the foundation for the Chief Justice's holding as to separability collapse?

For cases suggesting that due process requires an opportunity to apply to a court for an interlocutory stay of a state administrative order challenged on constitutional grounds, see Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196, 204–05 (1924); Porter v. Investors' Syndicate, 286 U.S. 461, 471 (1932).[8]

(4) Yakus v. United States, 321 U.S. 414 (1944) presented one of the issues reserved in Lockerty: the status of a claim of invalidity of the Price Control Act or of a regulation as a defense to a criminal prosecution for a violation. Section 204(d) was interpreted to bar attack upon a regulation (at least where not invalid on its face) but not upon the Act itself. Thus construed it was sustained against contentions that it involved deprivation of due process, contravened the Sixth Amendment, and worked an unconstitutional legislative interference with judicial power.

On the due process issue, the opinion of the Court by Chief Justice Stone treats as the central question whether the procedure for protest and review in the Emergency Court "affords to those affected a reasonable opportunity to be heard and present evidence" (p. 433). Concluding that it did, the opinion further holds that in "the circumstances of this case" there was "no denial of due process in the statutory prohibition of a temporary stay or injunction. * * * If the alternatives, as Congress could have concluded, were wartime inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation" (pp. 437, 439). Upon the other issues, the opinion stated, inter alia:

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[8] Compare, with the provisions passed on in Lockerty, the Voting Rights Act of 1965, 42 U.S.C. § 1973, which provides that actions to exempt states from the coverage of the Act and actions to permit certain "suspended" state voting regulations to go into effect must be brought in the District Court for the District of Columbia. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Court upheld this scheme, saying (pp. 331–32): "Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals. See Bowles v. Willingham, 321 U.S. 503, 510–512; Yakus v. United States, 321 U.S. 414, 427–431; Lockerty v. Phillips, 319 U.S. 182. At the present time, contractual claims against the United States for more than $10,000 must be brought in the Court of Claims, and, until 1962, the District of Columbia was the sole venue of suits against federal officers officially residing in the Nation's Capital. We have discovered no suggestion that Congress exceeded constitutional bounds in imposing these limitations on litigation against the Federal Government, and the Act is no less reasonable in this respect." Compare Allen v. State Board of Elections, 393 U.S. 544 (1969), holding that the provision limiting venue to the District does not apply to suits brought by private litigants for a declaratory judgment that certain state voting regulations are subject to the requirements of the Act.

South Carolina v. Katzenbach was an action to enjoin enforcement of various provisions of the Voting Rights Act, brought in the original jurisdiction of the Supreme Court. The parties do not seem to have referred to, and the Court decided the case without discussing, Section 14(b) of the Act, which provides that only the District Court for the District of Columbia "shall have jurisdiction to issue * * * any restraining order or temporary or permanent injunction" against enforcement of any provision of the Act. Did the Court, in deciding the case, sub silentio hold Section 14(b) unconstitutional insofar as it restricts the Supreme Court's original jurisdiction? See Justice Black's dissent, 383 U.S. at 357 n. 1; see generally Chap. III, p. 242, *supra*.

For further discussion of the judicial review provisions of the Voting Rights Act, see p. 347, note 27, *infra*.

"* * * [W]e are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue. * * * [p. 444.]

"For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U.S.C. §§ 6(7), 10(1); Armour Packing Co. v. United States, 209 U.S. 56, 81; United States v. Adams Express Co., 229 U.S. 381, 388. * * * During the present term of court we have held that one charged with criminal violations of an order of his draft board may not challenge the validity of the order if he has failed to pursue to completion the exclusive administrative remedies provided by the Selective Training and Service Act of 1940. Falbo v. United States, 320 U.S. 549; and see Bowles v. United States, 319 U.S. 33. We perceive no tenable ground for distinguishing that case from this. * * * [pp. 445–46.]

"Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process, which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the Administrator, was properly submitted to the jury" (pp. 447–48).

Justice Rutledge, dissenting in an opinion in which Justice Murphy joined, found "the crux" of the case to be in "the question whether Congress can confer jurisdiction upon federal and state courts in the enforcement proceedings, more particularly the criminal suit, and at the same time deny them 'jurisdiction or power to consider the validity' of the regulations for which enforcement is thus sought" (p. 467).

"It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. * * * There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials" (p. 468).

After questioning the constitutional adequacy of the statutory procedure even in cases where it is pursued and the regulation under protest is declared invalid, the opinion finds a "deeper fault" in a conviction "on a trial in two parts, one so summary and civil and the other criminal or, in the alternative, on a trial which shuts out what may be the most important of the issues material to * * * guilt" (pp. 478, 479). Quoting the guarantee of jury trial in the Sixth Amendment and Article III as well as the definition of the judicial power in Article III, it states: "By these provisions the purpose hardly is to be supposed to authorize splitting up a criminal trial into separate segments, with some of the issues essential to guilt triable before one court in the state and district where the crime was committed and others, equally essential, triable in another court in a highly summary civil proceeding held elsewhere, or to dispense with trial on them because that proceeding has not been followed. * * * If Congress can remove these questions, it can remove also all questions of validity of the statute, or, it would seem of law" (pp. 479, 480).[9]

(5) Bowles v. Willingham, 321 U.S. 503 (1944), decided the same day, sustained the exclusion of the validity of the regulation from the scope of a civil action brought by the Administrator to enjoin a landlord from prosecuting in a state court a suit to restrain the issuance of an order reducing certain rentals to conform to the prescribed maximum. In concurring in the result, Justice Rutledge distinguished between such a civil proceeding and enforcement by criminal prosecution, insisting, however, upon the following limitations, satisfied in his judgment in this case: "(1) The order or regulation must not be invalid on its face; (2) the previous opportunity must be adequate for the purpose prescribed, in the constitutional sense; and (3) * * * the circumstances and nature of the substantive problem dealt with by the legislature must be such that they justify both the creation of the special remedy and the requirement that it be followed to the exclusion of others normally available" (p. 526).

### E. The Portal to Portal Question

The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219, guarantees employees in industries covered by the Act compensation "at a rate not less than one and one-half times the regular rate" for a "work week longer than forty hours" and prescribes liability for unpaid overtime together with an additional equal amount as liquidated damages.

In Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590 (1944); Jewell Ridge Corp. v. Local No. 6167, 325 U.S. 161 (1945); and Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), the Supreme Court held that "work week", which the Act did not define, included underground travel in iron ore mines and similar preliminary and incidental activities of employees in connection with their work, which to a large extent had not theretofore been regarded as compensable unless the parties so agreed.

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[9] Justice Roberts also dissented but upon the ground that the Act involved an unconstitutional delegation of legislative power to the Price Administrator.

Actions instituted in the federal courts, based on these decisions, totaled 1913 between July 1, 1946, and January 31, 1947, claiming in excess of $5,000,000,000. The potential liability of the United States on War Department cost-plus contracts was estimated at $1,400,000,000; and $128,500,000 was claimed in five claims against the Maritime Commission. See H.R.Rep.No.71, 80th Cong., 1st Sess. 3, 4, 5 (1947); see also S.Rep.No.48, 80th Cong., 1st Sess. (1947).

Moved by these facts Congress enacted the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–62. It recited the finding of Congress that the recent decisions created immense, unexpected and retroactive liabilities, which would result in financial ruin for many employers, unexpected windfall payments to employees, and serious financial consequences for the United States Treasury. Sections 2(a) and (b) of the Act then proceeded to wipe out the liabilities substantively by providing that "no employer shall be subject to any liability or punishment" under the Fair Labor Standards Act for failure to compensate the preliminary and incidental work at issue.[10] In addition, Section 2(d) provided:

> "No court of the United States, of any State, Territory or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

It was claimed that the Act, in its retroactive operation, destroyed vested rights in violation of the Fifth Amendment. The contention was universally rejected on the merits. See Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711 (3d Cir. 1949). But the courts of appeals and most district courts treated it as open to decision, despite the jurisdictional provision and the usual separability clause. Thus Judge Chase, writing for the Second Circuit in Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), said:

> "A few of the district court decisions sustaining section 2 of the Portal-to-Portal Act have done so on the ground that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of Congress be taken away in whole or in part. * * * These district court decisions would, in effect, sustain subdivision (d) of section 2 of the Act regardless of whether subdivisions (a) and (b) were valid. We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court,[a] it must not so exercise that power as to deprive any person of

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[10] An exception was made for work which was compensable by virtue of express contractual agreements or by virtue of custom or practice at a particular establishment.

[a] "It also has the power, of course, to make 'exceptions' to and 'regulations' regarding the Supreme Court's appellate jurisdiction. * * *"

life, liberty, or property without due process of law or to take private property without just compensation. * * * Thus regardless of whether subdivision (d) of section 2 had an independent end in itself, if one of the effects would be to deprive the appellants of property without due process or just compensation, it would be invalid."

Judge Parker, on the other hand, approached decision of the question by sustaining § 2(a) on the merits and then adding: "Whether the denial of jurisdiction would be valid, if the provision striking down the claims were invalid, is a question which does not arise". Seese v. Bethlehem Steel Co., 168 F.2d 58, 65 (4th Cir. 1948).

If the jurisdictional issue were considered first and subdivision (d) held separable and valid, without regard to the due process question, would the consequence be that subdivision (a) would escape the due process test entirely or that it could be tested in an action brought in a state court? If the latter, would the judgment of the highest state court be reviewable in the Supreme Court, notwithstanding subdivision (d)?

Assuming that the state courts could not be prevented from passing on the constitutionality of subdivision (a), why didn't the federal courts pass first on the jurisdictional issue and leave the due process question to the state courts? Was it their premise that if Congress could not validly prevent the state courts from passing on the due process question, the Act should not be read as denying the same power to the federal courts?

## NOTE ON DEVELOPMENTS SINCE THE DIALOGUE

### A. Congressional Attempts to Restrict Jurisdiction

(1) In the fifteen years between 1953 and 1968, over sixty bills were introduced in Congress to eliminate the jurisdiction of the federal courts over a variety of specific subjects; none of these became law. Consider the following three notable examples. How would they have fared under the criteria proposed in the Dialogue?

The Jenner bill, S. 2646, 85th Cong., 2d Sess. (1958), was responsive to numerous Supreme Court cases of the mid-fifties invalidating or limiting federal and state programs aimed at alleged subversives.[1] It provided that "the Supreme Court shall have no jurisdiction to review, either by appeal, writ of certiorari, or otherwise, any case where there is drawn into question the validity of

"(1) any function or practice of, or the jurisdiction of, any committee or subcommittee of the United States Congress, or any action or proceeding against a witness charged with contempt of Congress;

"(2) any action, function, or practice of, or the jurisdiction of, any officer or agency of the executive branch of the Federal Government in the administration of any program established pursuant to an Act of Congress or otherwise for the elimination from service as employees in the executive branch of individuals whose retention may impair the security of the United States Government;

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[1] See, *e. g.*, Watkins v. United States, 354 U.S. 178 (1957); Cole v. Young, 351 U.S. 536 (1956); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Konigsberg v. State Bar, 353 U.S. 252 (1957).

"(3) any statute or executive regulation of any State the general purpose of which is to control subversive activities within such State;

"(4) any rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body, concerning subversive activities in its teaching body; and

"(5) any law, rule, or regulation of any State, or of any board of bar examiners, or similar body, or of any action or proceeding taken pursuant to any such law, rule, or regulation pertaining to the admission of persons to the practice of law within such State." [2]

The Jenner bill would have left untouched the jurisdiction of the lower federal courts. In contrast, in 1964, in response to the Supreme Court's decisions invalidating state legislative apportionments, Representative Tuck introduced, and the House of Representatives passed, H.R. 11926, 88th Cong., 2d Sess. (1964), which would have added the following provisions to Title 28:

"§ 1259. The Supreme Court shall not have the right to review the action of a Federal court or a State court of last resort concerning any action taken upon a petition or complaint seeking to apportion or reapportion any legislature of any State of the Union or any branch thereof."

"§ 1331(c). The district courts shall not have jurisdiction to entertain any petition or complaint seeking to apportion or reapportion the legislature of any State of the Union or any branch thereof * * *." [3]

In 1968 the Senate had before it Title II of the "Omnibus Crime Control and Safe Streets" bill, S. 917, 90th Cong., 2d Sess. (1968), which included the following provisions:

"§ 3502 [to be added to Title 18]. Neither the Supreme Court nor any inferior court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to review or to reverse, vacate, modify, or disturb in any way, a ruling of any trial court of any State in any criminal prosecution admitting in evidence as voluntarily made an admission or confession of an accused if such ruling has been affirmed or otherwise upheld by the highest court of the State having appellate jurisdiction of the cause." [4]

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[2] The Senate Judiciary Committee reported the bill favorably but in a truncated version, retaining the elimination of the Supreme Court's jurisdiction only in bar admission cases. See S.Rep.No.1586, 85th Cong., 2d Sess. (1958). The bill was killed on the Senate floor, 49–41. See 104 Cong.Rec. 18687 (1958). For discussion, see Pritchett, Congress Versus the Supreme Court 1957–1960 (1961); Elliott, *Court Curbing Proposals in Congress*, 33 Notre Dame Lawyer 597 (1958).

[3] The Senate rejected the Tuck bill, see 110 Cong.Rec. 22104 (1964). Compare the approach espoused by Senator Dirksen in his rider to the Foreign Aid Bill of 1964, H.R. 11380, 88th Cong., 2d Sess. (1964) (Amdt. No. 1191) (for original version see S. 3069, 88th Cong., 2d Sess. (1964)), which would have ordered the federal courts to "stay" any action questioning the constitutionality of state legislative apportionments "for such period as will be in the public interest", such period to be long enough (in the absence of "highly unusual circumstances") (a) to permit elections to be held under existing apportionments until January 1, 1966, and (b) to allow the state a "reasonable opportunity" to reapportion by statute or constitutional amendment. See 110 Cong.Rec. 19171–72 (1964).

The Tuck and Dirksen proposals were among the more than fifty bills introduced in the second session of the 88th Congress designed either to eliminate jurisdiction in or "stay" reapportionment cases. None of these became law. See generally McKay, *Court, Congress and Reapportionment*, 63 Mich.L.Rev. 255 (1964).

"§ 2256 [to be added to Title 28]. The judgment of a court of a State upon a plea or verdict of guilty in a criminal action shall be conclusive with respect to all questions of law or fact which were determined, or which could have been determined, in that action until such judgment is reversed, vacated, or modified by a court having jurisdiction to review by appeal or certiorari such judgment; and neither the Supreme Court nor any inferior court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to reverse, vacate, or modify any such judgment of a State court except upon appeal from, or writ of certiorari granted to review, a determination made with respect to such judgment upon review thereof by the highest court of that State having jurisdiction to review such judgment." [5]

(2) Professor Ratner called the Jenner bill "clearly invalid", on the ground that Congress has no power to make exceptions to the appellate jurisdiction of the Supreme Court which would "negate" the Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law." Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U.Pa.L.Rev. 157, 201–02 (1960) ("legislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment").[6] Can such a position be reconciled with the constitutional language? Berger, Congress v. The Supreme Court 285–96 (1969), and Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn.L.Rev. 53 (1962), argue that the power to make exceptions to the appellate jurisdiction was intended exclusively to deal with the problem of appellate review of findings of fact by a jury. But see Wechsier, *The Courts and the Constitution,* 65 Colum.L.Rev. 1001, 1005–06 (1965): "There is, to be sure, a school of thought that argues that 'exceptions' has a narrow meaning, not

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[4] This provision was followed by proposed § 3503, stating that no federal court shall have jurisdiction to "review, reverse, vacate, modify, or disturb in any way" the ruling of a state or federal trial court admitting in evidence in a criminal prosecution "the testimony of a witness that he saw the accused commit or participate in" the offense. This was designed to reverse United States v. Wade, 388 U.S. 218 (1967).

[5] These provisions were included in the bill reported out by the Judiciary Committee, see S.Rep.No.1097, 90th Cong., 2d Sess. (1968), but were eliminated on the Senate floor. See 114 Cong.Rec. 14171–84 (1968). See also S. 4058, 90th Cong., 2d Sess. (1968) (see 114 Cong.Rec. 27425–26 (1968)), a bill by Senator Dirksen which woud have, inter alia, removed the jurisdiction of all federal courts to "review, reverse or set aside" any state court finding of obscenity in a criminal prosecution. The bill did not reach the floor. It is discussed in Note, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?*, 1969 Duke L.J. 291.

[6] See also Levy, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U.Intra.L.Rev. 178 (1967); Note, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U.Pitt. L.Rev. 99 (1958).

including cases that have constitutional dimension; or that the supremacy clause or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as 'the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what Marbury v. Madison was all about. I have not heard that it has yet been superseded, though I confess I read opinions on occasion that do not exactly make its doctrine clear."

(3) Could it be argued that it is politically healthy that Professor Ratner's position has never been authoritatively accepted and that the limits of Congressional power have never been completely clarified? Does the existence of a Congressional power of unspecified scope help the maintenance of a desirable tension between Court and Congress?[7] In some circumstances, may not attempts to restrict jurisdiction be an appropriate and important way for the political branches to register disagreement with the Court and to channel and focus such contrary opinions in a way that will come to the Court's attention?[8] And is it not enormously significant in this regard that, ever since McCardle, such "attempts" have, in the main, been just that, that Congress has not significantly cut back the Supreme Court's jurisdiction in a "vindictive" manner despite the enormous unpopularity from time to time of some of its rulings?

That the Congress' failure to abuse its power to restrict jurisdiction is no mere accident is borne out by the following reminder of "practical objections" to a complete withdrawal of jurisdiction: "To begin with, government cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law. Within that area, the opportunity for litigating constitutional defenses is built in and cannot be foreclosed. The same necessity for federal tribunals will be felt in many situations that do not involve proceedings for enforcement; it has led Congress in recent years to expand remedial jurisdiction by such measures as the Federal Declaratory Judgment Act, the Tucker Act, the Administrative Procedure Act and others I could name. The withdrawal of such jurisdiction would impinge adversely on so many varied interests that its durability can be assumed. Beyond this, if the jurisdiction of the Supreme Court alone is withdrawn in a given field, as happened in McCardle, issues are left to final resolution in the lower courts, which may, of course, reach contrary results in different sections of the country. If, in addition, all federal jurisdiction is withdrawn, the resolution is perforce left to the courts of fifty states, with even greater probability of contrariety in their decisions. How long would you expect such inconsistency in the interpretation of the law of the United States to be regarded as a tolerable situation? There is, moreover, still another difficulty. The lower courts or the state courts would still be faced with the decisions of the Supreme Court as precedents—decisions which that Court would now be quite unable to reverse or modify or even to explain. The jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted its enactment, placing an intolerable moral burden on the lower courts.

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[7] For some analyses of these tensions, see Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J.Pub.L. 377 (1965); Nagel, *Court-Curbing Periods in American History*, 18 Vand. L.Rev. 925 (1965); see also Murphy, Congress and the Courts (1962).

[8] See *Hearings on the Supreme Court Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968), and especially the remarks of Professor Mishkin at 160–63, 202.

"These are the reasons why congressional control of jurisdiction has so rarely been exerted as a method of expressing dissidence to constitutional decisions, even when such dissidence has won the sympathy of Congress." Wechsler, *supra,* at 1006–07.

(4) It has been argued that any notion of plenary power in Congress to control the Supreme Court's appellate jurisdiction is in principle inconsistent with the Framers' intention to have the federal courts exercise the power of judicial review over the constitutionality of federal legislation. Berger, *supra,* at 285–86, 336–37. Do you agree? Could it not be argued that, politically and psychologically, the legitimacy of judicial review is enormously buttressed by the continuing existence of Congressional power to curtail jurisdiction? That the continuing existence of this power, rather than being a threat to judicial independence, is one of its important (though subtle) bulwarks?

In Glidden Co. v. Zdanok, p. 395 n. 11, *infra,* Justice Douglas criticized Justice Harlan for citing "with approval" the McCardle case, saying: "There is a serious question whether the McCardle case could command a majority view today." If this is so, should it be so? Even if McCardle is read "for all it might be worth," see Dialogue p. 330, *supra,* are the essentials of constitutional government in jeopardy?

(5) Notice that the "confession" section of the Crime Control bill was not cast in terms of withdrawing jurisdiction over a whole case; it simply insulated from reversal a state court "ruling" as to admissibility of confessions. Is this distinction significant in a case where the admissibility of the confession is the only federal question in the case? Where there are other federal issues in the case? Is this an example of a court being "given jurisdiction and at the same time [being] told to exercise it in violation of the Constitution," see Dialogue, p. 341, *supra*? Compare the occasional practice of the Supreme Court of granting certiorari on a limited basis and deciding only particular issues in the case: does this practice raise the same problems? [9]

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[9] See, *e. g.,* Roth v. United States, 352 U.S. 964 (1957) limiting the grant of certiorari to the constitutionality of the federal obscenity statute; thus, in deciding the case, 354 U.S. 476 (1957), the Court affirmed the conviction without passing on the obscenity of the materials involved. See also Chap. XI, p. 1599, *infra.*

In a Library of Congress memorandum to the Senate Judiciary Committee, proposed § 3502 was characterized as merely limiting the Supreme Court's power to review the *factual* determinations of state courts with regard to voluntariness. See S.Rep. No. 1097, 90th Cong., 2d Sess. 58–59 (1968). In view of the language and history of the bill, the characterization seems grossly unpersuasive. But assume that in another context Congress does seek merely to limit the Court's scope of review of questions of fact in constitutional litigation. How far is it free to do so? Consider, in this connection, Chap. V, Sec. 2(c), *infra.*

### B. Congressional Power Over Remedies: Judicial Review in Selective Service Cases

Consider, in the light of the following materials, the statements in the Dialogue, p. 332, *supra,* that "Congress necessarily has a wide choice in the selection of remedies," and that "the denial of one remedy while another is left open, or the substitution of one for another" are matters about which complaints "can rarely be of constitutional dimension".

(1) Under the Estep case, p. 342, *supra,* it was generally assumed until 1967 that questions concerning the legality of selective service classifications could not be raised prior to induction by suit for injunction or declaratory judgment, but had to be raised either by a petition for habeas corpus after induction, or as a defense to prosecution for failure to submit to induction. See, *e. g.*, Witmer v. United States, 348 U.S. 375, 377 (1955).[1] In the widely-publicized case of Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967), plaintiffs, students at the University of Michigan, alleged that they were unlawfully classified I–A and deprived of their student deferments in retaliation for participation in an anti-war demonstration. They sought an injunction barring their induction and ordering defendants to reinstate the deferments. The court of appeals held that the reclassifications were unauthorized[2] and that there was jurisdiction to issue the order: "[I]n the general run of cases [review must await induction] * * *. [But here] the effect of the reclassification itself is immediately to curtail the exercise of First Amendment rights, for there can be no doubt that the threat of receiving a I–A classification upon voicing dissent from our national policies has an immediate impact on the behavior of appellants and others similarly situated. * * * Since it is the mere

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[1] The cases are reviewed in Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues,* 17 U.C.L.A.L.Rev. 908, 910–15 (1970). See also Comment, *Pre-Induction Judicial Review,* 57 Calif.L.Rev. 948 (1970); Comment, *Anticipatory Attacks on Selective Service Classifications,* 117 U.Pa.L.Rev. 899 (1969). It appears that, prior to 1967, pre-induction review was permitted by way of injunction actions in only two cases: Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956) (jurisdictional issue not discussed); Tomlinson v. Hershey, 95 F.Supp. 72 (E.D.Pa.1949). Ex parte Fabiani, 105 F.Supp. 139 (E.D.Pa.1952), held that habeas corpus would lie, prior to induction or prosecution, since petitioner was in "constructive custody."

[2] The position of the court of appeals on the merits was subsequently upheld by the Supreme Court in Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968); Gutknecht v. United States, 396 U.S. 295 (1970); and Breen v. Selective Service Board No. 16, 396 U.S. 460 (1970), holding invalid in a variety of contexts the Selective Service System's regulations providing for the induction of "delinquents".

threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties" (pp. 823–24).[3]

(2) Shortly after Wolff, and evidently in direct response to it, Congress expressed its concern about any "inclination * * * to prematurely inquire into the classification action of local boards,"[4] by adding new § 10(b) (3) to the Military Selective Service Act of 1967, 50 U.S.C. App. § 460(b) (3):

"No judicial review shall be made of the classification or processing of any registrant * * * except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *."[5]

Consider, in connection with this statute, the question of just what is at stake, for the individual and for society, when Congress limits judicial review of the legality of a coercive government order, such as an induction order, to the defense of a criminal prosecution brought to punish its disobedience, without any way to test legality prior to disobedience. Compare the more general problem of appraising the advantages and disadvantages of providing advance judicial opinion as to whether proposed conduct is or is not criminal;[6] and compare also the materials on enjoining state criminal prosecutions, see Chap. VII, Sec. 3(c), *infra.* Is it desirable that one who claims exemption or deferment from the draft, and is refused, be put to the choice of foregoing his claim or risking criminal conviction in the event his claim turns out to be erroneous? Is it the purpose to discourage claims to exemption or deferment? Does it matter whether the context is one of full-scale mobilization, with exemptions and deferments a rarity, or of a highly selective selective-service, with many exemptions and deferments a matter of course? Does it matter on what grounds the claim for exemption or deferment rests? Whether the claim is based on the constitution itself?

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[3] The court relied heavily on Dombrowski v. Pfister, 380 U.S. 479 (1965), see Chap. VII, Sec. 3(c), p. 1013, *infra*. upholding a suit in federal court to enjoin the threat of state criminal prosecutions where a "substantial loss or impairment of freedoms of expression will occur" if plaintiffs are remitted to raising their First Amendment claims by way of defense to a state criminal prosecution.

[4] See H.R.Rep.No.267, 90th Cong., 1st Sess. 30-31 (1967): "The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System." See also S.Rep.No.209, 90th Cong., 1st Sess. 10 (1967).

[5] Although the statute does not explicitly preserve the post-induction remedy of habeas corpus to test the validity of a classification, the legislative history indicates that there was no intention to withdraw that traditional form of relief. See Senate and House reports, *supra* note 4. Indeed, the provision in the statute for review after a registrant has responded "affirmatively" to an order to report may refer to habeas corpus.

[6] See Note, *Declaratory Relief in the Criminal Law*, 80 Harv.L.Rev. 1490 (1967).

Is the availability of habeas corpus after induction an adequate resolution of these problems?

Notice that in some contexts—particularly where First Amendment rights are involved—questions relating to the structure and timing of remedies have been thought crucial to substantive constitutional policies. See, *e. g.*, the cases cited in the Dialogue, p. 335, note 7, *supra*, regarding judicial review in obscenity cases, and cases such as Dombrowski v. Pfister, p. 1013, *infra*. Compare, too, the issues raised by the question whether a person affected by judicial or administrative action has a right to be heard before such action is taken. See, *e. g.*, Sniadach v. Family Finance Corp. (right to hearing before wage garnishment), and Goldberg v. Keily (right to hearing before welfare is terminated), p. 335, note 7, *supra*. Do the problems raised by § 10(b) (3) differ? If so, how?

(3) Section 10(b) (3) first came before the Supreme Court[7] in Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968). Plaintiff was a full time student for the ministry; section 6(g) of the Act provides that such persons "shall be exempt" from service. 50 U.S.C.App. § 456(g). As a protest against American participation in the Viet Nam war, plaintiff turned in his registration certificate to the Government. His local board declared him "delinquent" for violating the regulation requiring possession of certificates and reclassified him I-A. He brought suit to restrain his induction. The Supreme Court reversed the lower courts' dismissal of the case. Holding that the government has no power to induct, as a delinquent, a person entitled by statute to exemption from service, Justice Douglas stated: "The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. As the Solicitor General suggests, such literalness does violence to the clear mandate of § 6(g) governing the exemption. * * * Since the exemption granted divinity students is plain and unequivocal and in no way contested here and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type" (pp. 238–39).

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[7] The statute had been declared unconstitutional by one district court in an interesting and elaborate opinion. See Peterson v. Clark, 285 F.Supp. 700 (N.D.Cal.1968) (subsequently reversed per curiam, 411 F.2d 1217 (9th Cir. 1969), on the basis of Clark v. Gabriel, p. 369, *infra*). The district court's conclusion was that under the due process clause judicial review cannot in this context be conditioned on the risk of either incurring a criminal penalty or complying with an invalid order. It relied on a series of rate cases in the Supreme Court holding invalid under the due process clause state regulatory schemes precluding judicial review of the validity of state rate orders except as a defense to criminal prosecutions for violations of such orders and imposing severe penalties for such violations. See *e. g.*, Ex parte Young, 209 U.S. 123, 146–48 (1908); Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913); Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920). (Note, however, that the significance of these rate cases had been limited by subsequent developments severely narrowing the power of federal courts to enjoin state criminal proceedings. See, *e. g.*, Douglas v. City of Jeannette, 319 U.S. 157 (1943), and see generally the materials at pp. 1009–50, *infra*.)

Justice Harlan, concurring, argued that § 10(b) (3) is applicable only to "the numerous discretionary, factual, and mixed law-fact determinations" of Selective Service boards which are of an "individualized and discretionary nature," and not to claims that the statutes or regulations administered by the Boards are invalid on their face—claims which can usually be tested on the pleadings and which are beyond the competence of the Boards themselves to settle. "To withhold pre-induction review in this case would thus deprive petitioner of his liberty without the prior opportunity to present to any competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation of § 10(b) (3) would raise serious constitutional problems * * *" (pp. 240, 243).

At this point Justice Harlan had a footnote, which reads as follows (pp. 243–44 n. 6): "It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims. Cf. Kwong Hai Chew v. Colding, 344 U.S. 590, 596–598 (1953); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152–153 (1941); United States v. Illinois Central R. Co., 291 U.S. 457, 463 (1934); Londoner v. City and County of Denver, 210 U.S. 373, 385 (1908); Dixon v. Alabama State Board of Education, 294 F.2d 150 (1961). But cf. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Bowles v. Willingham, 321 U.S. 503, 520 (1944); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). The validity of summary administrative deprivation of liberty without a full hearing may turn on the availability of a prompt subsequent hearing, cf. U.S. Const., Amdt. VI; United States v. Ewell, 383 U.S. 116, 120 (1966); Freedman v. Maryland, 380 U.S. 51 (1965)—something not made meaningfully available to petitioner here, either by the option of defending a criminal prosecution for refusing to report for induction, see Ex parte Young, 209 U.S. 123 (1908); Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920); cf. Reisman v. Caplin, 375 U.S. 440 (1964), or by filing a petition for a writ of habeas corpus after induction. See Estep v. United States, supra, at 129–130 (concurring opinion of Mr. Justice Murphy).

"The problem is exacerbated by petitioner's nonfrivolous argument that induction pursuant to the delinquency reclassification procedure constitutes 'punishment' for violation of collateral regulations, without jury trial, right to counsel, and other constitutional requisites. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–169 (1963). It is not necessary to decide this issue. If petitioner's claim is valid, however, then postponement of a hearing until after induction is tantamount to permitting the imposition of summary punishment, followed by loss of liberty, without possibility of bail, until such time as the petitioner is able to secure his release by a writ of habeas corpus. This would, at the very least, cut against the grain of much that is fundamental to our constitutional tradition. Cf. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv.L.Rev. 1362, 1380–1383 (1953)."

To this Justice Stewart, in dissent, replied (p. 250 n. 10): "Nor can I view the constitutional theory suggested by my Brother Harlan as presenting a justifiable ground for decision. It is noteworthy, first of all, that no such theory has ever been advanced by the petitioner. Furthermore, persons arrested for criminal offenses are routinely deprived of their liberty—to a greater extent than are military inductees—without any prior opportunity for the adjudication of legal or constitutional claims, and often without any hope of securing release on bail. Preliminary hearings before magistrates, by and large, determine only the existence of a prima facie case for the prosecution, and do not begin to reach defenses that might be raised, whether factual, legal, or constitutional. Nor does § 10(b) (3) necessarily compel deprivation of liberty. A registrant in the petitioner's position is free to refuse induction, keeping open the option of raising his claims should a criminal prosecution be brought against him. And it is entirely possible, of course—and more than likely in the petitioner's case—that no such prosecution will ever be instituted."

(4) Notice the extent to which in Oestereich the Court had to disregard both the language and the legislative history of § 10(b) (3) in order to "construe" it to authorize an early judicial check on the government. Why did the Court so strain the statute? Quite apart from lurking constitutional problems, is not the explanation that where the Congress places an explicit restriction on the government and it is alleged that the restriction has been ignored, the Court will struggle to give the potentially coerced citizen early and effective relief? Recall, in this connection, the passage in the Dialogue relating to "advance challenge" by prospective defendants, pp. 337–38, *supra*. And compare Leedom v. Kyne, p. 346, note 26, *supra*, also affording early relief, in spite of indications in the legislative scheme of congressional wishes to the contrary, to one harmed by government action conceded to be in violation of congressional command (though in that case not at the suit of a potential defendant).

(5) In Clark v. Gabriel, 393 U.S. 256 (1968), plaintiff's claim for classification as a conscientious objector was allegedly erroneously rejected, and he brought suit to enjoin his induction. The district court, following Peterson v. Clark, *supra* note 7, entered a preliminary injunction, holding that Section 10(b) (3) places such "hazards" and "penalties" in the way of judicial review as to result in "no review at all". 287 F.Supp. 369, 371 (N.D.Cal.1968). The Government took a direct appeal to the Supreme Court and filed a short jurisdictional statement in that Court asking that probable jurisdiction be noted. On the same day as the decision in Oestereich, without hearing argument and without briefs (or even a brief in opposition to the Government's jurisdictional statement) the Court reversed the district court in a short opinion per curiam. Oestereich was distinguished on the ground that here there was no challenge to the Board's statutory authority to take action, but rather to a particular exercise of the Board's admitted authority to classify conscientious objectors, which "inescapably involves" determinations of fact and exercises of judgment. "To allow pre-induction judicial review of such determinations would be to permit precisely the kind of 'litigious interruptions * * *' which Congress sought to prevent * * *." On the constitutional question the Court simply said (pp. 258–59): "We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to

induction. Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944)." Justices Brennan, Stewart and White concurred for the reasons stated in the dissent in Oestereich. Justice Black would have noted probable jurisdiction; Justice Douglas wrote a short concurrence on the ground that the case turned on the weight and credibility of testimony and thus was not an "extreme case where the Board can be said to flout the law" so as to justify anticipatory review (p. 260).

A few weeks later the Court in a one-sentence per curiam order affirmed, on the authority of Gabriel, a district court's dismissal, under 10(b)(3), of an attack on the system of student deferments based squarely on the independent constitutional ground of equal protection. Boyd v. Clark, 393 U.S. 316 (1969).[8]

(6) In Breen v. Selective Service Local Board No. 16, 396 U.S. 460 (1970), the Court held that Oestereich applies to permit pre-induction suit by a student unlawfully deprived of his statutory right to a student deferment on the basis of unauthorized delinquency regulations.[9] It rejected the government's suggestion that a distinction should be made between the "exemption" involved in Oestereich and the "deferment" involved in Breen: "In both situations a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service. In both cases the order for induction involved a 'clear departure by the Board from its statutory mandate,' Oestereich, *supra*, and in both cases § 10(b)(3) of the Act should not have been construed to require the registrants to submit to induction or risk criminal prosecution to test the legality of the induction order" (pp. 467–68).

On the other hand, in Fein v. Selective Service System Local Board No. 7, 405 U.S. 365 (1972), Gabriel was deemed controlling and § 10(b)(3) held to bar a suit brought to enjoin induction on the ground that the selective service statute and regulations governing the procedures for passing on a claim of conscientious objection violated the due process clause of the Fifth Amendment. (The procedures were alleged to be defective in failing to provide an adequate hearing and in withholding from the registrant a "statement of reasons" for denial of his claim, to be used in preparing various administrative appeals.) Justice Blackmun, writing for the Court, said that Fein, unlike Oestereich, "does not claim a statutory exemption or a statutory deferment on the basis of objectively established and conceded status" (p. 375), and that the "case strikes us" as falling in a category where allowing pre-induction review would tend to "promote" litigious interruptions of the selective service process (p. 376). Justice Stewart joined Justice Marshall's dissent, which argued (p. 392) that "pre-induction judicial review should be permitted where the registrant claims that generally applied rules administered by Selective Service are invalid, and where the administrative process is not competent to decide the registrant's claim." Justice Douglas also dissented.

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[8] For a discussion of this case, see Donahue, *supra* note 1, at 939–40.

[9] The post-Oestereich case law in the lower courts is extensively analysed in Donahue, *supra* note 1, at 925–31; see also *id.* at 968–74. Shortly after Breen the Supreme Court vacated the judgment in, and remanded for "further consideration" in light of Breen, six other cases involving pre-induction review. Kolden v. Selective Service Local Board No. 4, 397 U.S. 47 (1970).

(7) Are the Court's interpretations of § 10(b) (3) intelligible and defensible? For appraisals see Donahue, *supra* note 1; O'Neil, *Public Employment, Antiwar Protest and Preinduction Review*, 17 U.C.L.A.L.Rev. 1028, 1059–68 (1970); *The Supreme Court, 1968 Term*, 83 Harv.L.Rev. 7, 261 (1969). Justice Stewart, dissenting in Oestereich, said (pp. 251–52): "[T]he Court has carved out an 'exception' to § 10(b) (3) in exactly the kind of case where, in terms of the interests at stake, an exception seems least justified. The registrant with a clear statutory exemption is precisely the one least jeopardized by the procedural limitations of § 10(b) (3). * * * It is upon those registrants, rather, whose rights are *not* so clear that the burden of § 10(b) (3) most harshly falls. For it is they who must choose whether to run the serious risk of a criminal prosecution or submit to induction with the uncertain hope of prevailing in a habeas corpus proceeding. Yet the Court has made plain today in Clark v. Gabriel * * * that a registrant whose exemption from service is not clear will under § 10(b) (3) be put to just such a fateful choice. In light of Gabriel, the allowance of pre-induction review in the present case thus stands as all the more irrational and unjustified."

Has the Court dealt adequately with the constitutional problems raised by § 10(b) (3)? Recall the rate cases relied on in the Peterson case, see p. 367, note 7, *supra*. They do continue to stand as good authority that conditioning judicial review on the risk of serious penalties in the event complainant loses on the merits *may* violate the due process clause of the Fourteenth Amendment, at least if the effect is seriously to deter challenge to state action. Does the same principle not apply to Congress through the same clause in the Fifth Amendment? If not, why not? Because Congress' power over jurisdiction gives it greater leeway to choose among remedies?

Note that the principle of the rate cases could be applicable but § 10(b) (3) nevertheless upheld on due process grounds: inquiry might lead to the conclusion that avoiding the evil of disruption in the administration of the draft justifies postponing review and forcing registrants to take the risk of prosecution, or induction followed by habeas corpus. (Of course even that justification would be much stronger during full-scale mobilization.) But the Court in Gabriel did not even bother to make this inquiry.

Why were the constitutional questions raised by Justice Harlan in his footnote 6 in Oestereich, see p. 368, *supra*, deemed by him irrelevant in Gabriel? Is it an answer that in Gabriel, unlike Oestereich, the Board itself was a competent forum to pass on the validity of the claims at issue?

The registrant's dilemma is especially troublesome, is it not, if his claim is that induction would violate *constitutional* rights—First Amendment or otherwise—and yet his right to exemption or deferment is unclear? Recall that in Wolff pre-induction review was justified precisely on the basis that postponing review might "chill" the exercise of First Amendment rights. The petitioners in both Oestereich and Breen also argued that prompt judicial intervention was necessary to preserve independent constitutional interests; but the Court's opinion leaves this problem wholly unexplored. Solicitor General Griswold, in his Oestereich brief, argued that § 10(b) (3) should be construed to allow pre-induction review in that case to prevent "repeal" of the exemption granted to divinity students (an argument termed "fanciful" by the Harvard Law Review, *supra*, at 265), but opposed any general exemption for cases involving First Amendment questions and rejected the analogy to Dombrowski v. Pfister (see p. 366, note 3, *supra*). Brief for Respondents at 28–31, 63, Oestereich v. Selective Service System Local Board No. 11, *supra*.

Boyd v. Clark and the Fein case, *supra*, show of course that the Court is not prepared to accept a rule that claims for exemption from service based on constitutional grounds should always be canvassed on pre-induction review. Do not such claims present a special case nevertheless? Should distinctions be drawn for this purpose among different constitutional claims?

(8) Note that in all the cases involving § 10(b) (3) the courts assumed without question that, acting under the general federal-question jurisdictional grant of § 1331, they could pass on the applicability of § 10(b)(3) and adjudicate the merits of the case if it was found inapplicable or invalid.[10] The cases thus illustrate the proposition put forward in the Dialogue, p. 348, *supra*, that power to test the validity of jurisdictional and remedial limitations is plain as long as there is an applicable grant of general jurisdiction. And in spite of the casualness of the opinion in Gabriel, it is clear, is it not, that in the exercise of such general jurisdiction the courts have an undoubted obligation to evaluate seriously the fairness of and justification for any remedial restrictions imposed by the Congress?[11]

How, on the other hand, could the courts have dealt with § 10(b) (3) in the absence of the general jurisdictional grant of § 1331?

## C. Court Martial Jurisdiction

In connection with the question whether a criminal defendant has a right to be tried in a constitutional court, adverted to in the Dialogue at p. 331, *supra*, consider the cases which have, since 1955, increasingly narrowed the power of Congress to determine what offenses may be tried (at least in peacetime) by military courts martial.

(1) United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), held that the Constitution forbids the trial by court martial of a civilian, discharged from the armed forces, for an offense committed while abroad on active duty before his discharge. Mr. Justice Black for the Court held that the constitutional power "To make Rules" to regulate "the land and naval Forces" is restricted "to persons who are actually members or part of the

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[10] Subject to difficult and controversial questions, not passed on in Oestereich, *supra* (at 239) or Wolff, *supra* (at 826), raised by the jurisdictional-amount requirement of § 1331 in selective service litigation. See *e. g.*, Boyd v. Clark, 287 F.Supp. 561 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 316 (1969) (without reaching question of jurisdictional amount); Murray v. Vaughn, 300 F. Supp. 688, 694–96 (D.R.I.1969) (suggesting that the jurisdictional amount limitation would be invalid if it prevented pre-induction judicial review of plaintiff's serious constitutional claims); Fein v. Selective Service System Local Board No. 7, 430 F.2d 376, 384–85 (2d Cir. 1970) (Lumbard, J., dissenting) (disposed of on other grounds, 405 U.S. 365 (1972)); see also Note, 53 Cornell L.Rev. 916 (1968). See generally Chap. VIII, Sec. 2, p. 1158, *infra*.

[11] Consider, for example, a Congressional statute providing that judicial review of the lawfulness of the commissioner's income-tax assessments may be had only by way of defense to criminal prosecutions for failure to pay taxes. Is it conceivable that the Court would treat such a statute with the casualness manifested in Gabriel? *Cf.* Reisman v. Caplin, 375 U.S. 440 (1964).

# Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis

*Although the judicial and legislative branches of our government are considered separate, Congress has certain powers over the Supreme Court. One of these is the power to regulate the Court's appellate jurisdiction; this Article explores the derivation and extent of that power. After an analysis of the Constitutional Convention of 1787 and of the attitudes of its delegates, the author concludes that this power was intended to be limited to regulating the treatment of fact issues and not issues of law.*

Henry J. Merry*

The power of Congress over the appellate jurisdiction of the Supreme Court is one element of constitutional law that would seem to have been settled early in the history of the two institutions but, actually, few constitutional problems are more fundamentally unsolved. Strangely enough, this lack of resolution is due to the long standing mutual indulgence of what have often been pictured as bitter enemies. On the one hand, beginning with the Judiciary Act of 1789, Congress has always recognized that the Supreme Court has substantial appellate power;[1] on the other hand, since 1796 the Supreme Court has repeatedly gone beyond strict judicial needs to declare that its appellate jurisdiction depends upon statutory enactment.[2] The limitations that Congress has imposed have not presented a real test of its power with respect to the Court's essential functions.[3] But a disturbing factor is the thought implicit in the remarks of the Court that it is not substantially independent, as those who revere a government of laws believe that it should be.[4] The danger is not simply hypothetical. Congress has often been urged to curb the Court by curtailing its appellate jurisdiction,[5] and these attacks on the Court may have been caused in part by the uncertainties or overstatements of the scope of congressional authority.

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[1] For example, Congress has always provided that the Supreme Court may re-examine and reverse or affirm the final judgment or decree of the highest court of a state when there is a question of repugnance of state law to the United States Constitution, and state law is upheld. REV. STAT. §§ 690, 709 (1875); 28 U.S.C. § 1257 (1958).

[2] See Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796), discussed in text accompanying note 61 *infra*. In Colorado Cent. Consol. Mining Co. v. Turck, 150 U.S. 138, 141 (1893), the Supreme Court declared that "an uninterrupted series of decisions" has held that "this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that

The problem has both inherent and circumstantial difficulties. It is basically a matter of determining how much appellate jurisdiction is derived directly from the Constitution and how much is dependent upon congressional acknowledgment, and such indicia as are implicit in the constitutional language have long been reversed in the structure of congressional enactments as well as in the remarks of the Supreme Court. Even though the Constitution says that the Court shall have appellate jurisdiction and gives Congress only the secondary role of making exceptions and regulations,[6] the Judiciary Act of 1789 and its successors have not set

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subject." In Stephan v. United States, 319 U.S. 423, 426 (1943), the Court said that its appellate jurisdiction is "defined by statute."

[3] See notes 11 & 16 *infra.*

[4] See Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court,* 109 U. PA. L. REV. 157 (1960).

[5] See Freund, *Storm Over the American Supreme Court,* 21 MODERN L. REV. 345 (1958).

[6] U.S. CONST. art. III, § 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The authorization of Congress in this clause may be contrasted with that on the establishment of inferior courts. Congress has full discretion over whether inferior courts may even exist, but the Constitution provides that the Supreme Court shall exist and that it shall have appellate jurisdiction. With respect to inferior courts, congressional authority is full and precedent, whereas with respect to the jurisdiction of the Supreme Court, congressional power is limited in scope and subsequent or secondary in character. Chief Justice Marshall declared in one opinion that the appellate powers of the Supreme Court "are given by the constitution." Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810); *accord, Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–13 (1868). The opinion in Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250 (1865), says that the Constitution defines the power to receive appellate jurisdiction, and that within this capacity, Congress may determine how far jurisdiction is to be given and exercised. This reverses the emphasis in the constitutional language, but the reversal of emphasis was not essential to the decision. The *Daniels* case involved a statute providing that if the circuit court justices are evenly divided, review is limited to issues of law. Such a statute is peripheral or procedural in forth exceptions, but rather have defined the types of cases in which the Court may act.[7] This may be interpreted as making exceptions by implication,[8] but the impression is that Congress is the source of the Court's jurisdiction.[9] This impression has been fortified by the repeated assertions of the Supreme Court that it can exercise appellate jurisdiction only in accordance with acts of Congress.[10] These statements contain an element of obiter dictum,[11] but removing the overstatement has only a neutralizing ef-

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character and can appropriately be regarded as secondary or subordinate to the primary principle that the Supreme Court has substantial and essential appellate jurisdiction.

7. For example, the Judiciary Act of 1789 provided that "the Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for . . . ." Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 81 (1789). This method of enactment or style of presentation would be clearly proper on the jurisdiction of the inferior courts, and the same style may have been used throughout the act for purposes of uniformity. The act also specified in the same manner the types of cases within the original jurisdiction of the Court even though this jurisdiction is unquestionably derived directly from the Constitution.

8. Mr. Chief Justice Marshall, in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810), said:

> They [Congress] have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

9. In fact, one leading authority even approves the statement that "the Constitution specifically grants to Congress the power to determine the Court's appellate jurisdiction." PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-60, at 122 (1961). Some commentators make the nominal distinction that while "strictly speaking" the Constitution confers appellate jurisdiction, such jurisdiction is as a practical matter statutory. ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 2 (2d ed. 1951). See also Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 KAN. L. REV. 16 (1956). This article cites the limits imposed by United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), which held invalid a Congressional enactment laying down a "rule of decision" on proof of loyalty in certain post-Civil War situations. This, however, was less an attempt to deny jurisdiction than an effort to control substantive determination.

10. For instance, in Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796), the Court said: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." This case and statement are discussed in note 59 *infra* and accompanying text. In St. Louis & I.M. Ry. v. Taylor, 210 U.S. 281 (1908), the Court declared that it exercises appellate jurisdiction only in accordance with acts of Congress. In The Francis Wright, 105 U.S. 381, 386 (1881), the opinion goes so far as to say that "authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction."

11. Many cases have dealt with statutory limitations upon the appellate

fect,[12] and the question of the extent of Congress' power remains open.

Some attention has been given to the problem,[13] and while this has aided in clarifying the issue, it has not been particularly satisfactory in arriving at a solution. The position that Congress cannot completely deny appellate jurisdiction[14] is not very helpful because it can be circumvented by a merely nominal grant.[15] While the doctrine that Congress cannot deny the Court "essential functions"[16] has a certain appeal, it seems to rest upon such indefinite factors as the necessity of a supreme independent judiciary in a federal union under law,[17] the principle of balance of powers,[18]

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> jurisdiction of the Supreme Court. A few contain broad language referring to unlimited congressional control over that jurisdiction. But none unequivocally holds that Congress has power to impair the Court's essential constitutional functions. In every case the Court either found no limitation on its jurisdiction or upheld a limitation which did not impair those functions.

Ratner, *supra* note 4, at 173. In defining "essential functions," Professor Ratner points out that the Supreme Court has regarded its indispensable functions to be the establishment and maintenance of the uniformity and supremacy of federal law. *Id.* at 166.

[12] The fundamental principle that statements of a court have no binding effect beyond the limits of the issue before the court at the time has been asserted many times. *E.g.*, Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 103 (1937); Northern Bank v. Porter Township Trustees, 110 U.S. 608, 615 (1884); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821). But this limitation upon binding effect does not give the statements the contrary meaning that Congress lacks authority in this area; the limitation merely neutralizes the opinions to the extent of the overstatement.

[13] See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312–40 (1953); Lenoir, *supra* note 9; Ratner, *supra* note 4.

[14] Chief Justice Marshall indicated in two opinions that if Congress did not describe any jurisdiction, the Supreme Court would have full jurisdiction. Durousseau v. United States, 10 U.S. (6 Cranch) 307, 312–13 (1810); United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805).

[15] HART & WECHSLER, *op. cit. supra* note 13, at 312.

[16] "[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." HART & WECHSLER, *op. cit. supra* note 13, at 312. The idea is further developed in Ratner, *supra* note 4. A somewhat similar thought is expressed in COUNTRYMAN, THE SUPREME COURT OF THE UNITED STATES 79–80 (1913), where it is contended that the Court "cannot constitutionally be deprived of its appellate jurisdiction in any novel or specially important branch of legal controversy." The "essential functions" idea is distinct from the idea advanced by Mr. Justice Story in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), and not subsequently followed by the Court, that Congress is duty bound to vest in the federal courts the whole judicial power described in the Constitution. That theory related to the power of the inferior courts and not to the appellate jurisdiction of the Supreme Court.

[17] Ratner, *supra* note 4, at 166. On the importance of an independent judiciary, see also St. Louis & I.M. Ry. v. Taylor, 210 U.S. 281, 293 (1908); Ableman v. Booth, 62 U.S. (21 How.) 506, 517 (1858); Dodge v. Woolsey, 59 U.S. (18 How.) 331, 355 (1856); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 380, 415 (1821).

[18] Ratner, *supra* note 4, at 173.

and the general meaning of the terms "exceptions" and "regulations."[19] A more specific ascertainment of how much authority the Constitutional Convention intended to place in Congress is needed. This article undertakes to analyze not only the meager evidence in the available record of the Convention of 1787, but also the relevant circumstances and the attitudes of the delegates who were most concerned with the adoption of the constitutional provision. It is hoped that such an analysis will throw some light upon the purpose of the provision and in turn provide a means of measurement.

## I. THE CONVENTION OF 1787

The idea of giving Congress power to make exceptions and regulations in respect to the appellate jurisdiction of the Supreme Court originated, officially at least, in the five member Committee of Detail,[20] which met between July 26 and August 6, 1787, to draft a proposed constitution on the basis of resolutions which had been adopted during two months of debate on the original Randolph plan. The Committee was also to consider the Pinckney plan, which had been submitted at the start of the Convention. None of these resolutions or plans had suggested that Congress was to have any power over the jurisdiction of the Supreme Court.[21] Why the Committee brought forth this authorization of congressional power must be ascertained largely from the circumstances and surrounding data because there is very little precise information available on the proceedings in the Committee itself.[22]

There are fairly strong indications that the grant of congres-

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[19] *Id.* at 168–71.

[20] The members of the Committee of Detail were John Rutledge (South Carolina), Edmund Randolph (Virginia), Nathaniel Gorham (Massachusetts), Oliver Ellsworth (Connecticut), and James Wilson (Pennsylvania).

[21] In the records of the Convention, the Randolph and Pinckney plans are usually presented under date of May 29, 1787, and the resolutions referred to the Committee of Detail under date of July 26, 1787. The two plans and the approved resolutions provided for appellate jurisdiction, but only the Pinckney plan called for original jurisdiction. In this and in the description of judicial power, the final constitutional provision is somewhat more akin to the Pinckney plan than to the Randolph plan or the resolutions derived from the latter.

[22] 2 Farrand, The Records of the Federal Convention 129–75 (1911) [hereinafter cited as Farrand], relates to the Committee of Detail. This includes the plans submitted to the Committee, its report, and a few other documents not particularly helpful in the matter under study.

One document in the handwriting of Edmund Randolph provides that the jurisdiction of the supreme tribunal shall be appellate only, except in those instances in which the legislature shall make it original "and the sional power over the Supreme Court's appellate jurisdiction was related to the problem of the extent of the Court's review of issues of fact as distinguished from those of law. While the provision reported by the Committee of Detail did not expressly say that Congress was to have power to make exceptions and regulations both as to law and fact,[23] substantial grounds exist for concluding that the Committee did struggle with the problem of fact issues. Although much of the evidence is indirect, there is at least one piece of rather direct support for this conclusion. When the provision reported by the Committee of Detail was being considered on the floor of the Convention, Gouverneur Morris of Pennsylvania asked whether the appellate jurisdiction was to extend to matters of fact as well as law and to cases of common law as well as civil law.[24] James Wilson, a member of the Committee of Detail, an-

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legislature shall organize it." *Id.* at 147. This plan also provides that the whole or a part of the jurisdiction prescribed for the supreme tribunal may, in the discretion of the legislature, be assigned to the inferior tribunals "as original tribunals." This looks upon the supreme tribunal primarily as an appellate court. Another document in the handwriting of James Wilson includes a provision on the judiciary that accords no discretion to the legislature on jurisdiction generally, but gives the national legislature the exclusive right of instituting in each state a court of admiralty for hearing and determining maritime causes. *Id.* at 157. Elsewhere, there is an interesting document found among the Mason papers but not in Mason's handwriting. This includes a plan under which appellate jurisdiction as to fact would relate only to equity and admiralty and maritime jurisdiction and the discretion of Congress on appellate jurisdiction would apply only to cases of admiralty and maritime jurisdiction. *Id.* at 433.

[23] The relevant provision in the report of the Committee of Detail, following the sentence specifying the cases in which the jurisdiction of the Supreme Court would be original, states: "In all the other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations, as the legislature shall make." 5 ELLIOT'S DEBATES 380 (1866) [hereinafter cited as ELLIOT]. A floor amendment on August 28, 1781, provided that the Court was to "have appellate jurisdiction" rather than "be appellate." *Id.* at 484. In addition to this and the other floor amendment described in the text, there were other language changes in the final draft. *Id.* at 563.

[24] *Id.* at 483. The distinction between common law and civil law would also seem to involve the different treatment of fact issues by the courts. The reference to civil law in the Convention debates probably referred to the procedure in admiralty and equity cases, the civil law origin of which was then more openly recognized than it is now. See, for example, the remark of Alexander Hamilton about "the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery." THE FEDERALIST, No. 81, at 531 (Mod. Lib. ed. 1941) (Hamilton). On the civil law origin of equity and admiralty procedure as reflected in American jurisprudence, see COCKE, A TREATISE ON THE COMMON AND CIVIL LAW, AS EMBRACED IN THE JURISPRUDENCE OF THE UNITED STATES 33, 34, 41, 43, 119, 120 (1871). The Judiciary Act of 1789 provided that "the trial of issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." 1 Stat. 77 (1789).

swered Morris and stated that the Committee "meant facts as well as law and Common as well as Civil Law."[25] Other members of the Committee did not object and presumably agreed. A motion to insert "both as to law and fact" was adopted without discussion or dissent as if it were a declaratory action.[26] At this point the Convention rejected a motion that would have given Congress full precedent authority to define appellate jurisdiction.[27]

The idea that the authorization of Congress arose from the problem of reviewing fact issues is further supported by the nature of another creation of the Committee of Detail—the provision guaranteeing jury trial in criminal cases. This guarantee immediately followed the section on Supreme Court jurisdiction in the report of the Committee.[28] Like the idea of authorizing Congress to make exceptions and regulations to appellate jurisdiction, the guarantee of jury trial in criminal cases was not proposed in any material officially submitted to the Committee and hence was a Committee creation. Both the fact that the Committee provision did not carry the jury trial guarantee beyond criminal cases and the fact that the Supreme Court was authorized to review fact issues were criticized by the delegates at the Convention and in the ratification debates, and the nature of the charges and the grounds for the defense on the two matters had much in common. Both provisions were attacked as not recognizing the traditional common law right to have facts determined by a jury, and both were defended on the ground that diversity of practice among the states, particularly in equity and maritime cases, made specific agreement on a broader provision virtually impossible at the Convention. The problem may have been accentuated by differences of opinion on the nature of admiralty jurisdiction, but the Convention seems to have been strangely hesitant to attempt a resolution of the differences.[29]

The difficulties arising from the varying practices in the judicial treatment of fact issues were mentioned a number of times during the closing days of the Convention in opposition to proposals that the jury trial guarantee should be broadened. For example, when a motion was put forth that jury trial be preserved as usual in civil cases (meaning noncriminal cases), Gorham of Massachusetts, who had been a member of the Committee of Detail, pointed out that the nature of juries and the type of cases in which jury trial was usual differed among the states; the proposal was defeated.[30] Similar objections were interposed, with equal success, when suggestions were made for a committee to consider the jury trial problem and when a bill of rights was proposed.[31] Again, in the debates on the ratification of the Constitution, delegates referred to the conflicting practice among the states.[32] For example, Richard Spaight of North Carolina, in answer to objections, asserted that "the trial by jury was not forgotten in the Convention," but the delegates had found it "impossible to make any one uniform regulation for all the states."[33] He specifically related the difficulty to equity and maritime cases:

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[25] 5 Elliot 483. Wilson also pointed out that the jurisdiction of "the federal court of appeals had . . . been so construed." *Ibid.*

[26] The motion was by Dickinson of Delaware. *Ibid.*

[27] *Ibid.*

[28] The Committee reported on August 6, 1787. *Id.* at 381.

[29] The Convention undertook to resolve a number of other difficult problems, such as those referred to the Committee of Eleven on August 31, 1787. 5 Elliot 503, 506, 507, 510, 520. No attempt was made to agree definitely upon the scope of the appellate jurisdiction of the Supreme Court. The action of the Convention in this regard hardly suggests that they intended to grant Congress virtually full discretion over the Court's appellate power. Rather, the Convention seems to have acted as if they were referring to Congress a particular problem which the Committee of Detail had found highly controversial and which the delegates wished to avoid.

> There are a number of equity and maritime cases, in some of the states, in which jury trials are not used. Had the Convention said that all causes should be tried by a jury, equity and maritime cases would have been included. It was therefore left to the legislature [Congress] to say in what cases it should be used . . . .[34]

Thus, the difficulty with the jury trial guarantee centered upon the different practices in equity and maritime cases, and in this connection it is worthy of note that the subsequently adopted seventh amendment applies only to common law actions.[35]

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[30] On September 12, 1787, Williamson (North Carolina) urged a jury trial guarantee in civil cases, but Gorham (Massachusetts), who had been a member of the Committee of Detail, responded that it is not possible to "discriminate" equity cases from those in which juries are proper. On September 15, 1787, a motion was made to add a clause to the third paragraph of the judiciary article to provide that "a trial by jury shall be preserved as usual in civil cases." Gorham interposed that the nature of juries differs among the states and what is "usual" would not be the same in all the states. King (Massachusetts) made similar objections, and Gen. Pinckney said that such a clause would be "pregnant with embarrassments." The motion was disapproved without a record vote. 5 ELLIOT 538, 550.

[31] *Id.* at 538.

[32] George Washington, in a letter of April 28, 1788, to Lafayette, said with respect to trial by jury that "it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the convention to leave it, as a matter of future adjustment." 3 FARRAND 297–98.

[33] 4 ELLIOT 139–44.

[34] *Id.* at 144.

[35] The seventh amendment also requires that the re-examination by the federal courts of a fact tried by a jury be according to the rules of the

*The Federalist* contains definite indications that the problem encountered with the appellate jurisdiction of the Court involved issues of fact, not issues of law, and that the controversy over appellate review was connected with the problem of jury trial, which of course involved only fact issues. Alexander Hamilton, in discussing the provision on appellate jurisdiction, stated that "the propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact."[36] He also acknowledged that persons deriving their notions from the court of New York have considered the provision on appellate jurisdiction to be "an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery." Hamilton then points out that the term "appellate" would not have the same meaning in New England as it would in New York. The various difficulties are evident in his explanation of the manner in which the Convention may have arrived at the express inclusion of appellate jurisdiction relating to fact issues:

> The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the Supreme Court (it may have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the reexamination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace.[37]

This suggests that in common law areas, the Supreme Court would consider issues of law and in other areas, such as those using civil law procedures, the Court would review issues of fact. The reference to prize causes is noteworthy because it is another indication that the disturbing factor in the Convention was the appellate review of admiralty cases. Hamilton continues:

> It is therefore necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States

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common law. This would seem to limit to some extent the appellate power of the Supreme Court. In any event, it is a further manifestation of the difficulty presented by the diverse modes of procedures in the courts at the time.

[36] THE FEDERALIST No. 81, at 530 (Mod. Lib. ed. 1941) (Hamilton).

[37] *Id.* at 532.

> *all causes* are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.[38]

Hamilton's explanation is consistent with the idea that the problem facing the Committee of Detail and the Convention was the review of fact issues. He brings together as common or related problems the diversity of practice on the trial of fact issues, the extent to which the Supreme Court should review issues of fact, and the granting of authority to Congress to make exceptions and regulations. Likewise, he did not regard the congressional authorization as permitting Congress to exercise virtually unlimited control over the appellate jurisdiction of the Court. In his mind the Supreme Court was to be independent of Congress, and he went to some pains to convince his fellow New Yorkers of the need for such independence even though the highest court of New York was a part of the legislature. There would have been no need for such argument if the Court was to be at the mercy of Congress for its appellate jurisdiction. But Hamilton did not calm the fears of the New Yorkers by saying that Congress could control the Court through its power to make exceptions and regulations; rather, he pointed out that an independent judiciary was the established practice in a number of states, and he argued for the necessity of a supreme independent judiciary in the constitutional plan presented.[39]

Some further evidence that the Founding Fathers connected the guarantee of jury trial and the scope of appellate review is found in the seventh amendment, which provides, in part, that no fact tried by a jury shall be re-examined by any court of the United States other than according to the rules of the common law.

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[38] *Id.* at 532–33.

[39] The Federalist No. 80, at 516 (Mod. Lib. ed. 1941) (Hamilton):

> If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.

It is noteworthy that the Convention agreed to establish the Supreme Court on the day after it had rejected a proposal that Congress have power to negative state laws.

The fact that the grant of authority to Congress concerning the appellate jurisdiction of the Supreme Court includes the power to make regulations as well as exceptions does not disturb the idea that the grant of authority was designed for the problem of how far the Court should review issues of fact. "Regulations" suggest that procedural methods and the choice of procedures (as between writ of error or appeal) may determine whether the appellate court will review merely issues of law or review issues of fact as well.[40] There is little likelihood that the Constitutional Convention was thinking of regulations needed for efficient operation. Such rules could come within the scope of implied or inherent powers. When Congress passed the Judiciary Act of 1789, it undertook to control the Supreme Court's power to review issues of fact by regulating the modes of procedure as much as by excluding types of cases.[41] For controversial types of cases, the act prescribed writ of error rather than appeal.[42]

In general, the Judiciary Act of 1789 seems to have restricted the Supreme Court's authority over fact questions to perhaps an undesirable extent, and some modification was enacted in 1803.[43] But the 1789 statute broadly and affirmatively recognized the Supreme Court's authority to review issues of law. Appeals were not recognized in criminal cases, but that was the general English practice at the time,[44] and the specific authority to deal with writs of habeas corpus permitted consideration of at least the more important questions of law arising in criminal proceedings.[45] Thus, the congressional action in 1789 does not refute the idea that the Convention merely intended that Congress was to settle the dispute over the review of fact issues, and it may even support such an interpretation.

## II. ATTITUDES OF THE DELEGATES

The foregoing discussion indicates that the meetings of the Committee of Detail between July 26 and August 6, 1787, were the turning point in the Convention's decision to grant Congress certain authority over the appellate jurisdiction of the Supreme

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[40] See Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796), discussed in text accompanying note 59 *infra*.

[41] Ch. 20, § 22, 1 Stat. 84 (1789).

[42] See Warren, *History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 74–75, 102–03 (1923).

[43] Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244 (1803). See 12 Annals of Cong. 263, 265 (1803); United States v. Nourse, 31 U.S. (6 Pet.) 470, 496 (1832).

[44] Ratner, *supra* note 4, at 195.

[45] *Id.* at 196–201.

Court. Prior to that time there was no proposal of congressional authorization nor any recorded mention of appellate review of fact issues. Until then, the delegates, with perhaps little specific reflection on the matter, seem to have thought of a Supreme Court as dealing only with the determination of issues of law.[46]

In the Eighteenth Century appellate review was less concerned with fact issues than it is now. Among common law jurisdictions, appeals of fact questions were probably limited to equity cases in such states as had courts of Chancery,[47] but such appeals existed in the federal courts in admiralty cases under acts of the Continental Congress and the Articles of Confederation.[48] This is particularly relevant because of the various references by delegates to maritime cases and because one member of the Committee of Detail, James Wilson of Pennsylvania, had strong feelings about admiralty jurisdiction and the review of fact issues in such cases. What he did and said in the meetings of the Committee of Detail, if known, would probably be the best clues to why the Convention extended certain discretionary authority to Congress over the appellate jurisdiction of the Supreme Court.[49] There is little record of what occurred within the Committee, but Wilson's statements and actions elsewhere clearly indicate that he was very anxious to have appellate review by the national judiciary of fact issues in admiralty cases. There seems to be a definite possibility that Wilson, in seeking recognition of this power in the Supreme Court, opened the whole question of how far fact issues could be reviewed. Because a broad scope of review threatened to undermine the value of jury trial, these problems may have become too complex or too controversial for either the Committee or the Convention to resolve.

Wilson's interest in admiralty cases and the national judiciary extended over most of the last quarter of the Eighteenth Century. In 1775 he was appointed to the committee established by the Continental Congress under the Articles of Confederation to make final determinations in capture cases,[50] and he was a member of that group until 1777. In the following year he had an even closer experience regarding appellate review of capture cases. This involved a controversy in which he served as appeal attorney for General Benedict Arnold, then military governor of Philadelphia. Arnold had purchased the claim of one Gideon Olmstead to prize money from the capture of the British sloop *Active*. Olmstead, along with a number of other American sailors, had been captured and placed aboard the British vessel. He then led an attempt to seize the ship and was meeting with some success when an American brig, the *Convention,* under commission from the State of Pennsylvania, captured the British ship. At the time, the privateer *Gerard* was standing by. The prize money was claimed by all participants and, at a trial by jury in the Pennsylvania admiralty court, the prize money was awarded four ways: one fourth to the State of Pennsylvania, another to the crew of the *Convention,* another to the *Gerard,* and the last to Olmstead and his colleagues, although they seem to have taken the greatest risks.[51] Wilson took the matter to the Congressional Court of Appeals, which awarded his client a larger judgment. However, the Pennsylvania court refused to accept the larger award on the ground that a state law prohibited appeals to a higher court on the findings of fact by a jury.[52] This experience may have given Wilson a special reason for wanting the Constitution to recognize the power of the national judiciary to review admiralty cases as to both fact and law.

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[46] There was very little discussion of the Court's jurisdiction prior to the meeting of the Committee of Detail. No plan submitted to the Convention nor resolution adopted by it had mentioned the review of fact issues.

[47] One of the principal constitutional amendments proposed during the ratification debates would have confined appellate power to questions of law. See Warren, *supra* note 42, at 56.

[48] Warren, *supra* note 42, at 74.

[49] Wilson seems to have been an active member of the Committee of Detail. The documents set forth in 2 Farrand 129–75 under the heading "Committee of Detail" consist almost entirely of papers from the Wilson collection. One draft of the Constitution includes the provision on appellate jurisdiction as it emerged from the Committee of Detail. *Id.* at 173.

[50] 1 Journals of Cong. 177 (Way & Gideon ed. 1823).

The records of the Convention disclose that Wilson had a continuing interest in this matter. Within a week after the session began, he asserted that "the admiralty jurisdiction ought to be given wholly to the national government, as it related to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen."[53] Later, when the provision reported by the Committee of Detail was being discussed and Gouverneur Morris inquired of the scope of the appellate jurisdiction, it was Wilson who answered that the Committee intended the authority to include questions of fact. Other members of the Committee seemed to avoid further consideration of the review of fact issue and the jury trial question, and when the latter problem was brought up, one member, Nathaniel Gorham of Massachusetts, argued that it was too difficult to be considered.[54] In the debates of the Convention on ratification,

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[51] SMITH, JAMES WILSON 124 (1956).

[52] *Id.* at 125–27.

[53] 5 ELLIOT 159; *cf.* Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 324 (1796).

[54] See note 30 *supra.*

Wilson defended the provisions on appellate review and jury trial more positively and more specifically than any other member of the Committee of Detail. In his speech before the Pennsylvania House of Delegates, he tended to regard the two provisions as related.[55] As to jury trial he asserted that there was ample protection in the authority of the legislature to determine the mode of trial.[56] On appellate jurisdiction he was even more definite:

> The jurisdiction as to fact may be thought improper; but those possessed of information on this head see that it is necessary. We find it essentially necessary from the ample experience we have had in the courts of admiralty with regard to captures.[57]

The matter of admiralty cases was uppermost in his mind, and he called attention to cases in which vessels had been captured during the Revolutionary War, remarking "what a poor chance" owners had before juries and "in what a situation they would have been if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdicts of those juries."[58] Thus, his intense interest in the review of admiralty cases seems to be a continuing preoccupation. The records disclose that two months before the Committee of Detail met, Wilson had advocated that the admiralty jurisdiction be exclusively national and that five months after the Committee reported, he defended appellate review of fact issues in his speech before the Pennsylvania House of Delegates. Most likely, it was Wilson who raised the problem which led the Committee and the Convention to authorize Congress to make exceptions and regulations of the appellate jurisdiction of the Supreme Court.

It is equally interesting that James Wilson was also the catalyst in the formation of the Supreme Court's position that appellate jurisdiction is dependent upon congressional action. In *Wiscart v. Dauchy*,[59] when Wilson was a Justice of the Supreme Court and his one time associate on the Committee of Detail, Oliver Ellsworth, was the Chief Justice, the Court first asserted its dependence upon Congress for appellate jurisdiction. The *Wiscart* case was an equity proceeding in which the circuit court held that the execution of certain deeds had been fraudulent because they prevented the complainant-creditor from obtaining satisfaction of his claim. The appeal before the Supreme Court turned principally on whether the circuit court had sufficiently stated the facts on which it decided the case in the pleadings and the decree, and the Court held that the facts were adequately set forth. In the opinion of the Court, Ellsworth said that where equity or admiralty cases are removed to the Court with a statement of facts but without evidence, the statement is conclusive. On this the Court was unanimous. But only the majority asserted that the statement of facts is conclusive even when the evidence is brought forward; Wilson and Patterson dissented.[60]

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[55] 3 FARRAND 167–68.

[56] 2 ELLIOT 488 (2d ed. 1876).

[57] *Id.* at 493.

[58] *Ibid.* Wilson also said that attempts were made in some states to destroy this power of review, but that the power was confirmed in every instance. He noted that there were other cases in which review will be necessary but did not identify the types. *Id.* at 493–94.

[59] 3 U.S. (3 Dall.) 321 (1796).

Ellsworth's mention of admiralty cases apparently stirred Wilson into action because he presented a separate opinion that dealt mainly with the question of Supreme Court review of fact issues in admiralty cases. Although this seems to have been outside the scope of the case, Wilson explained that admiralty jurisdiction was important because it affected the rights of foreigners, a point he had also made before the Constitutional Convention in 1787.[61] His most pertinent contention in the *Wiscart* opinion was that *an appeal* (which would permit review of fact issues) was the proper mode of removing an admiralty case. He also argued that a denial of such review in admiralty cases would be unconstitutional. Moreover, he interpreted the Judiciary Act of 1789 as excluding admiralty cases from the general provision that civil cases were to be removed by writ of error; admiralty cases were not intended to come within the category of civil cases, and since Congress had thus not dealt with such cases, the Court had jurisdiction by virtue of its constitutional powers.[62]

Wilson's contentions caused Ellsworth to enter a rebuttal opinion—the practice being to have seriatim opinions by the Justices in the nature of a dialogue—and it is in this second, rebuttal opinion that Ellsworth made the famous assertion that "if Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[63] The first part of this statement is historically the more important, but it was unnecessary because Ellsworth maintained that Congress had prescribed the mode of review.[64] Ellsworth's statement would probably not have been made if Wilson had not been so determined to plead again the cause which had disturbed him since his experience in the *Olmstead* case 18 years before—the power of the national judiciary to review the facts in admiralty cases as well as the law. Because Wilson went out of his way to maintain that the Supreme Court had such power, Ellsworth went out of his way to say that the Court lacked it. They were both a bit afield, perhaps continuing arguments begun in the Committee of Detail ten years earlier. But what Ellsworth said at the time of the *Wiscart* case has been virtually gospel for the Supreme Court from that year to this. Thus, both the constitutional provision empowering Congress to make exceptions and regulations with respect to the appellate jurisdiction of the Supreme Court and the broad interpretation that the Court has given to this provision seem to have originated because of Wilson's determined efforts to establish review of fact issues in admiralty cases.

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[60] That Patterson was the fellow dissenter is indicated in Jennings v. The Brig Perseverance, 3 U.S. (3 Dall.) 336 (1797), which held that the review of admiralty cases does not extend to fact questions.

[61] 3 U.S. at 324.

[62] *Id.* at 325–27.

[63] *Id.* at 327.

[64] Ratner, *supra* note 4, at 174.

## CONCLUSION

The constitutional grant of authority to Congress over the appellate jurisdiction of the Supreme Court appears to have originated because of a particularly limited problem—the extent to which the Supreme Court should have jurisdiction to review fact issues in those cases in which practice differed among the states. There is a definite possibility that the grant of authority to Congress was devised in the Committee of Detail of the Constitutional Convention in order to avoid further controversy when James Wilson of Pennsylvania insisted that the Constitution recognize the power of the national judiciary to review fact issues in admiralty cases. Later, when the controversy was reopened and the issue was re-argued by Ellsworth and Wilson in the *Wiscart* opinions, the Supreme Court was started on a long path of overstatement of Congress' power.

What actually happened in the Committee of Detail may always remain largely unverified, but there is considerable evidence that delegates to the Convention associated the grant of power to Congress with the divergent practice among the states on the review of fact questions. If the intent of the Constitutional Convention is deemed to be controlling, then there would seem to be substantial grounds for saying that the authority of Congress to make exceptions and regulations with respect to the appellate jurisdiction of the Supreme Court is limited to the treatment of fact issues. The effect of such a limited interpretation would be principally to exclude power that Congress has not exercised. As indicated previously, the restrictions that Congress has imposed upon the review of issues of law have been no more than those that seem necessary for the efficient operation of the Court. Such restrictions can be made either by Congress, under a limited implied power to provide for the operation of the Court, or by the Court itself, under an inherent power to maintain its existence in an efficient manner.

Nevertheless, there would be substantial benefits resulting from recognition of the principle that the power of Congress over the appellate jurisdiction of the Supreme Court is limited to the treatment of fact issues. This principle would tend to reconcile the action of the Constitutional Convention in granting this power to Congress with the Convention's general purpose of establishing a substantially independent national judiciary. On this assumption, the comparatively little attention which the delegates gave to this provision is better understood. This interpretation of the power to make exceptions and regulations would tend to calm any fears that might arise from the prospect that the dicta in Supreme Court opinions would actually be applied if Congress would attempt to deny the Court any of its important authority.

of "pendent parties." [19] This problem takes different forms in different contexts and is discussed in each of these contexts in subsequent sections.[20]

It is usually held that where ancillary jurisdiction suffices to allow a claim, or a party without independent jurisdictional grounds, it is also unnecessary to satisfy the venue statutes with regard to that claim or party. Though there have been cases to the contrary,[21] it would seem that if procedural convenience is enough to avoid the constitutional limitations on the jurisdiction of the federal court, it should suffice also to dispense with the purely statutory requirements as to venue.[22]

In general the ancillary concept does not avoid the requirement that the party to be brought in must be served with process within the territorial limits set out in Rule 4(f).[23] One interesting problem in this area, however, has not yet been resolved by the courts. Where out-of-state service is possible under a federal statute allowing such service for particular claims, does the process also bring the party into court to respond to a claim, joined with the statutory claim, as to which, if sued on independently, out-of-state service would be improper? Though the matter is not settled,[24] it would seem that where the claims are sufficiently related to come within the ancillary jurisdiction concept, the process should be regarded as sufficient to bring the party into court to respond to both claims.[25]

## § 10. Congressional Control of Jurisdiction [1]

In section 8 it was seen that, in general, the jurisdiction of the federal courts must find its basis in Article Three of the Constitution

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[19] See, e. g., Fortune, Pendent Jurisdiction—The Problem of "Pendenting Parties," 1972, 34 U.Pitts. L.Rev. 1; Note, 1976, 62 Va.L.Rev. 194; Comments, 1974, 20 Loy.L.Rev. 170, 73 Col.L.Rev. 153.

The possibility of "pendent parties" is discussed, but not resolved, in Moor v. County of Alameda, 1973, 93 S.Ct. 1785, 1796–1799, 411 U.S. 693, 710–717, 36 L.Ed.2d 596. There is also a guarded discussion, and a refusal to allow "pendent parties" in one specific situation, in Aldinger v. Howard, 1976, 96 S.Ct. 2413, — U.S. —, 49 L.Ed.2d 276. See § 19 below.

[20] Joinder of a federal claim against one party with a related nonfederal claim against another party, § 19 below. Joinder of a party whose citizenship defeats complete diversity, § 24 below. Joinder of a party with a claim for less than the jurisdictional amount, § 36 below.

On joinder of parties generally, see § 71 below.

[21] Lewis v. United Air Lines Transport Corp., D.C. Conn.1939, 29 F.Supp. 112; King v. Shepherd, D.C. Ark.1938, 26 F.Supp. 357; Habina v. M. A. Henry Co., D.C.N.Y.1948, 8 F.R.D. 52.

[22] Lesnik v. Public Industrials Corp., C.C.A.2d, 1944, 144 F.2d 968, 974–977; Abramovitch v. U. S. Lines, D.C.N.Y.1959, 174 F.Supp. 587; 6 Wright & Miller, Federal Practice and Procedure: Civil § 1445. But see Note, Ancillary Process and Venue in the Federal Courts, 1960, 73 Harv.L.Rev. 1164.

[23] U. S. v. Rhoades, D.C.Colo.1953, 14 F.R.D. 373; O'Brien v. Richtarsic, D.C.N.Y.1941, 2 F.R.D. 42.

[24] Compare Robinson v. Penn Central Co., C.A.3d, 1973, 484 F.2d 553; United States Dental Institute v. American Ass'n of Orthodontists, D.C.Ill.1975, 396 F.Supp. 565, 575–576; Cooper v. North Jersey Trust Co., D.C.N.Y.1964, 226 F.Supp. 972, 980–982, Kane v. Central American Mining & Oil, Inc., D.C.N.Y.1964, 235 F.Supp. 559, and Puma v. Marriott, D.C.Del.1969, 294 F.Supp. 1116, with Wilensky v. Standard Beryllium Corp., D.C.Mass.1964, 228 F.Supp. 703, 705–706, and Trussell v. United Underwriters, Ltd., D.C.Colo.1964, 236 F.Supp. 801.

[25] See Mills, Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Law, 1970, 70 Cal.L.Rev. 423; ALI Study, § 1313(a). But see Ferguson, Pendent Personal Jurisdiction in the Federal Courts, 1965, 11 Vill.L.Rev. 56.

[§ 10]

[1] 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§ 3525, 3526; Berger, Congress v. Supreme Court, 1969, pp. 285–296; Harris, The Judicial Power of the United States, 1940, c. 2; Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 1953, 66 Harv.L.Rev. 1362; Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 1960, 109 U.Pa.L.Rev. 157; Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 1962, 47 Minn.L.Rev. 53; Strong, Rx for a Nagging Constitutional Headache, 1971, 8 San Diego L.Rev. 246; Keeffe & Warlick, Article III: Where Are You Now that We Need You?, 1976, 62 A.B.A.J. 240.

tution. The present section is concerned with the extent to which the judicial power granted by the Constitution is subject to control by Congress.

The question is most readily answered with regard to the original jurisdiction of the Supreme Court. Although the First Congress, in the Judiciary Act of 1789, undertook to set forth that jurisdiction, it has always been understood that the constitutional language is, in this regard, self-executing, and that Congress cannot take that jurisdiction away from the Supreme Court.[2] Congress cannot expand the original jurisdiction of the Supreme Court, even to cases otherwise within the judicial power of the United States,[3] nor can it deny such jurisdiction. It can, however, provide that the jurisdiction of the Supreme Court in cases within the grant of original jurisdiction, be concurrent with the district courts,[4] and can give appellate jurisdiction in cases that might also fall within the original jurisdiction of the Supreme Court.[5]

Cong. cannot expand orig. juris. MARBURY

The Constitution, after defining the original jurisdiction of the Supreme Court, provides that in all other cases within the judicial power of the United States, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The power to make exceptions in this jurisdiction was tested in the famous case of Ex parte McCardle.[6] An Act of 1867 gave the Supreme Court appellate jurisdiction in habeas corpus cases. Prior to that time there was no such jurisdiction on appeal, though the Supreme Court could issue original writs of habeas corpus and certiorari, and review a denial of habeas corpus below by this means. McCardle was a civilian, held for trial by a military commission in Mississippi pursuant to Reconstruction statutes. The circuit court denied his application for habeas corpus, and he appealed. In 1868, while the case was pending before the Supreme Court, Congress, apprehensive lest the Supreme Court would grant the writ and thus invalidate much of the Reconstruction legislation, passed an amendatory statute, taking away the appellate jurisdiction of the Supreme Court in habeas corpus cases. The Supreme Court held that the 1868 legislation deprived it of jurisdiction. It considered that this was a legitimate exercise of the congressional power to make exceptions to appellate jurisdiction, and that it was immaterial that the act was passed after the Supreme Court had already taken jurisdiction of the case. This case has long been read as giving Congress full control over the Supreme Court's appellate jurisdiction, but of late there has been some suggestion that this is reading too much into the McCardle decision, and that Congress does not have power to make such exceptions as will destroy the essential role of the Supreme Court in the constitutional plan.[7] This read-

McCardle ↓

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[2] Chisholm v. Georgia, 1793, 2 Dall. 419, 1 L.Ed. 440; Florida v. Georgia, 1854, 17 How. 478, 15 L.Ed. 181; Kentucky v. Dennison, 1860, 24 How. 66, 16 L.Ed. 717.

[3] Marbury v. Madison, 1803, 1 Cranch 137, 2 L.Ed. 60; Wisconsin v. Pelican Ins. Co. of New Orleans, 1888, 8 S.Ct. 1370, 1379, 127 U.S. 265, 300, 32 L.Ed. 239.

[4] Ohio v. Wyandotte Chemicals Corp., 1971, 91 S.Ct. 1005, 401 U.S. 493, 28 L.Ed.2d 256; Ames v. Kansas ex rel. Johnston, 1884, 4 S.Ct. 437, 111 U.S. 449, 28 L.Ed. 482; U. S. v. California, C.A.9th, 1964, 328 F.2d 729, certiorari denied 85 S.Ct. 34, 379 U.S. 817, 13 L.Ed.2d 29. Congress has in fact done this ever since 1789. See 28 U.S.C.A. §§ 1251, 1351. See §§ 109, 110 below.

[5] Cohens v. Virginia, 1821, 6 Wheat. 264, 5 L.Ed. 257.

[6] 1868, 7 Wall. 506, 19 L.Ed. 264. See Van Alstyne, A Critical Guide to Ex Parte McCardle, 1973, 15 Ariz.L.Rev. 229.

⑦ Brant, Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause, 1973 Ore.L.Rev. 3; Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 1960, 109 U.Pa.L.Rev. 157; Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 1953, 66 Harv.L.Rev. 1362, 1365. See also Merry, Scope of the Supreme Court's Aping, for which there is little or no direct authority, is fortified by the fact that shortly after the McCardle case it was held that the Supreme Court could still issue original writs of habeas corpus and certiorari, and thus review in a case like McCardle's.[8] The argument is that the essential role of the Supreme Court is not destroyed when, as in 1868, one means of approach is taken away but another is left open. To deprive litigants altogether of access to the Supreme Court in cases involving the supremacy of federal law, as was proposed in a bill considered by Congress in 1958 that would have denied all jurisdiction to the Supreme Court in cases involving five classes of subject matter, would, on this approach, be invalid.

note: essential functions argued

Congress has a considerable discretion in dealing with the jurisdiction of the lower federal courts. It can provide a particular court for hearing certain questions and deny all other courts the power to consider that question,[9] even to the point of precluding raising the invalidity of a regulation as a defense in a criminal action, where there was a court provided in which the invalidity of the regulation might have been asserted.[10] Congress can provide that cases within the judicial power shall come to the federal courts by removal, rather than in their original jurisdiction.[11] It can take away from the courts power to grant a particular remedy or to enforce a particular kind of contract.[12]

From the First Judiciary Act to the present, Congress has provided that in certain instances the jurisdiction of the federal courts shall be exclusive of the courts of the several states,[13] though federal jurisdiction is not exclusive unless Congress chooses to make it so, either expressly or by fair implication.[14] At present the most significant areas in which Congress has made federal jurisdiction exclusive are bankruptcy proceedings,[15] patent and copyright cases,[16] cases involving fines, penalties, forfeitures, or seizures, under laws of the United States,[17] and crimes against the United States,[18] though there are some others.[19]

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pellate Jurisdiction: Historical Basis, 1962, 47 Minn.L.Rev. 53, arguing that congressional control of the Supreme Court's appellate jurisdiction was intended to extend only to questions of fact, not questions of law.

In a dissenting opinion in Glidden Co. v. Zdanok, 1962, 82 S.Ct. 1459, 1501 n. 11, 370 U.S. 530, 605, 8 L.Ed.2d 671, Justices Douglas and Black say "there is a serious question whether the McCardle case could command a majority view today."

note

[8] Ex parte Yerger, 1869, 8 Wall. 85, 19 L.Ed. 332.

[9] Lockerty v. Phillips, 1943, 63 S.Ct. 1019, 319 U.S. 182, 87 L.Ed. 1339.

[10] Yakus v. U. S., 1944, 64 S.Ct. 660, 321 U.S. 414, 88 L.Ed. 834.

[11] Tennessee v. Davis, 1880, 100 U.S. 257, 25 L.Ed. 648; Martin v. Wyzanski, D.C.Mass.1967, 262 F. Supp. 925.

[12] Lauf v. E. G. Shinner & Co., 1938, 58 S.Ct. 578, 303 U.S. 323, 82 L.Ed. 872.

[13] 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3527. The constitutionality of this practice was thought beyond serious question in The Moses Taylor, 1867, 4 Wall. 411, 18 L.Ed. 397.

[14] Claflin v. Houseman, 1876, 93 U.S. 130, 23 L.Ed. 833; Charles Dowd Box Co. v. Courtney, 1962, 82 S.Ct. 519, 523, 368 U.S. 502, 507–508, 7 L.Ed.2d 483. Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 1957, 70 Harv.L.Rev. 509.

[15] 28 U.S.C.A. § 1334; 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3570; Mussman & Riesenfeld, Jurisdiction in Bankruptcy, 1948, 13 Law & Contemp.Prob. 88.

[16] 28 U.S.C.A. § 1338(a); 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3582; Cooper, State Law of Patent Exploitation, 1972, 56 Minn.L.Rev. 313; Chisum, The Allocation of Jurisdiction between State and Federal Courts in Patent Litigation, 1971, 46 Wash.L.Rev. 633.

[17] 28 U.S.C.A. §§ 1355, 1356; 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 3578. The ALI Study, pp. 184–186, proposes repeal of these provisions.

[18] 18 U.S.C.A. § 3231.

[19] 28 U.S.C.A. §§ 1351 (consuls and vice-consuls as defendants), 1583 (review of decisions of collectors of customs); 1346 (United States as defendant). In

The statute purports to give the federal courts exclusive jurisdiction of cases of admiralty and maritime jurisdiction,[20] but by virtue of the "saving to suitors" clause in the statute, in fact federal jurisdiction is exclusive only in limitation of liability proceedings and in maritime actions in rem.[21]

Though a wide power in Congress to regulate the jurisdiction of the federal courts has never been challenged, there has been discussion from 1789 on about whether Congress can refuse to vest in any federal court some part of the judicial power granted by the Constitution. On this question at least four positions are possible: ① the constitutional grant is self-executing, and if there is some part of the judicial power not vested by Congress, the courts can hear such cases on the basis of the Constitution alone; ② the constitutional language is mandatory, and Congress should vest the whole of the judicial power, but the duty is not enforcible if Congress should fail to act; ③ Congress has discretion in deciding whether or not to give to the federal courts any part of the constitutional judicial power, save that the grant of original jurisdiction to the Supreme Court is self-executing; ④ though Congress has a wide discretion in granting or refusing to grant jurisdiction, there are due process limitations on this discretion. Scholarly and judicial support can be found for each of these views.

The difficulty on this point was felt in the first Congress. "The crucial contest in the enactment of the Judiciary Act," Charles Warren tells us, was between the broad pro-Constitution men who believed that Congress had no power to withhold from the federal courts any of the judicial power granted by the Constitution, and the narrow pro-Constitution men who were anxious to give the federal courts as little jurisdiction as possible.[22] Though the jurisdictional grants which were made in the First Judiciary Act are patently a compromise between these two positions, the fact is that Congress did not grant to the federal courts the full judicial power of the United States. There was no general grant of "federal question" jurisdiction, jurisdictional amount requirements barred access to federal court for small cases otherwise within the judicial power, and the troublesome "assignee clause" denied jurisdiction, though there was diversity between the parties of record, in some cases where the plaintiff was an assignee of a claim originally owned by a person who, for want of diversity, could not have sued in federal court.

The constitutionality of the decision of the first Congress might have been thought settled in 1799.[23] A case came to the Supreme Court in which the indorsee of a note had sued, and diversity existed between him and the defendants, but the record did not show the citizenship of the indorsers of the note. At the oral argument it was asserted that the citizenship of the indorsers was immaterial; since there was citizenship between the

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the last of these categories it is only by implication that federal jurisdiction is exclusive.

Some provisions for exclusive federal jurisdiction appear outside the Judicial Code. See, e. g., 15 U.S.C.A. §§ 15, 26 (antitrust actions), 15 U.S.C.A. § 78aa (cases under the Securities Exchange Act) 15 U.S.C.A. § 717u (violations of the Natural Gas Act), and 40 U.S.C.A. § 270(b) (suits on bonds under the Miller Act).

See Note, Implied Rights Under the Securities Exchange Act of 1934—Federal Jurisdiction—Exclusive or Concurrent?, 1969, 21 Case West.Res.L.Rev. 93.

[20] 28 U.S.C.A. § 1333.

[21] See 14 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3672; ALI Study, pp. 234-239; Black, Admiralty Jurisdiction: Critique and Suggestions, 1950, 50 Col.L.Rev. 259, 266-267.

[22] Warren, New Light on the History of the Federal Judiciary Act of 1789, 1923, 37 Harv.L.Rev. 49, 65-70.

[23] Turner v. The President, Directors, and Company of the Bank of North America, 1799, 4 Dall. 8, 1 L. Ed. 718.

parties of record, the constitutional requirement was satisfied, and Congress lacked power to limit that jurisdiction by the assignee clause. Chief Justice Ellsworth expressed his doubt as to how far the argument could be carried, and Justice Chase expressed his view more strongly: "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."[24] Though the opinion of the Court, holding the suit must fail for want of allegations as to the citizenship of the indorsers, does not discuss the constitutional question, it was necessarily present in the case, and, in view of the oral argument, cannot be thought to have been overlooked.

A different answer was given, however, by Justice Story, speaking for the Court in 1816, in the supremely important case of Martin v. Hunter's Lessee.[25] The language of Article Three, he said, "is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested (not may be vested) in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish. * * * The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the constitution they might defeat the constitution itself; a construction which would lead to such a result cannot be sound. * * * If, then, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all."[26]

Despite this strong statement of view, Justice Story apparently believed that the Constitution, though mandatory, was not self-executing. Sitting at circuit two years later, he marvelled at the fact that the jurisdiction conferred by Congress fell so far short of the constitutional extent, but held nevertheless that the court had no jurisdiction not given by some statute.[27]

Justice Story's view was not to prevail. At least since 1845 it has been frequently stated by the Supreme Court that "the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."[28]

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[24] 4 Dall. at 10.

[25] 1816, 1 Wheat. 304, 4 L.Ed. 97.

[26] 1 Wheat. at 328-330.

[27] White v. Fenner, C.C.D.R.I.1818, 20 F.Cas. 1015 (No. 17,547).

[28] Cary v. Curtis, 1845, 3 How. 236, 245, 11 L.Ed. 576. To the same effect, see Sheldon v. Sill, 1850, 8 How. 441, 12 L.Ed. 1147; Plaquemines Tropical Fruit Co. v. Henderson, 1898, 18 S.Ct. 685, 170 U.S. 511, 42 L.

There is so much authority for the proposition that Congress is free to grant or withhold the judicial power that it might seem unnecessary to belabor the point. Yet lingering doubts remain. In 1949 the Court of Appeals for the District of Columbia asserted that it is compulsory upon Congress to confer the whole of the judicial power upon some federal court, and that if a case arises under the Constitution, laws, or treaties of the United States, jurisdiction to entertain it is in some district court by compulsion of the Constitution itself.[29] That decision was reversed, though on other grounds,[30] but it is interesting that a court at so late a date was willing to take a position which went even beyond Story's. Yet the position is supported by some modern writers.[31] Further there are other writers who recognize the general authority of Congress in this area, but who suggest that there are due process limits on the congressional power.[32] A decision of the Second Circuit lends supports to this thesis, saying that "while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation." [33] If there is any limit on Congress, this is probably the maximum limit. Nearly two centuries of history stand in the way of those who would claim that Congress must vest the entire judicial power.

## § 11. "Constitutional" and "Legislative" Courts [1]

Article III, § 1, of the Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices

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Ed. 1126; Kline v. Burke Const. Co., 1922, 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077; Lockerty v. Phillips, 1943, 63 S.Ct. 1019, 319 U.S. 182, 87 L.Ed. 1339; Palmore v. U. S., 1973, 93 S.Ct. 1670, 1678, 411 U.S. 389, 400–402, 36 L.Ed.2d 342.

[29] Eisentrager v. Forrestal, D.C.Cir.1949, 174 F.2d 961, 966.

[30] Johnson v. Eisentrager, 1950, 70 S.Ct. 936, 339 U.S. 763, 94 L.Ed. 1255.

[31] 1 Crosskey, Politics and the Constitution in the History of the United States, 1953, pp. 610–620; Howland, Shall Federal Jurisdiction of Controversies Between Citizens of Different States be Preserved?, 1932, 18 A.B.A.J. 499; Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 1974, 83 Yale L.J. 498.

[32] Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 1953, 66 Harv.L.Rev. 1362; Pritchett, The Political Offender and the Warren Court, 1958, pp. 65–69; Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 1975, 124 U.Pa.L.Rev. 45.

[33] Battaglia v. General Motors Corp., C.A.2d, 1948, 169 F.2d 254, 257, certiorari denied 69 S.Ct. 236, 335 U.S. 887, 93 L.Ed. 425.

Several district courts have held that Congress cannot constitutionally require more than $10,000 to be in controversy if the effect is to bar any judicial review of a constitutional claim. Cortright v. Resor, D.C.N.Y.1971, 325 F.Supp. 797, 808–811; West End Neighborhood Corp. v. Stans, D.C.D.C. 1970, 312 F.Supp. 1066, 1068; Murray v. Vaughn, D.C.R.I.1969, 300 F.Supp. 688, 695–696. The courts of appeals have held to the contrary. Goldsmith v. Sutherland, C.A.6th, 1970, 426 F.2d 1395, certiorari denied 91 S.Ct. 353, 400 U.S. 960, 27 L.Ed.2d 270; Spock v. David, C.A.3d, 1972, 469 F.2d 1047, appeal after remand C.A.3rd 1974, 502 F.2d 953, reversed on other grounds, 1976, 96 S.Ct. 1211, — U.S. —, 47 L.Ed.2d 505; McGaw v. Farrow, C.A.4th, 1973, 472 F.2d 952.

[§ 11]

[1] 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3528; Note, The Distinction between Legislative and Constitutional Courts and its Effect on Judicial Assignment, 1962, 62 Col. L.Rev. 133; Comment, Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation, 1962, 71 Yale L.J. 979; Note, The Legislative Court Problem: A Proposed Solution, 1963, 38 N.Y.U.L. Rev. 302

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IRVING BRANT*

# Appellate Jurisdiction: Congressional Abuse Of the Exceptions Clause

IN 1963, by a vote of eight to one, the Supreme Court of the United States outlawed compulsory prayers in public schools as an establishment of religion violating the first amendment.[1] Since then there has been a campaign to overturn that decision—a campaign that has gained widespread support because of an erroneous impression that the decision prohibits voluntary school prayers.

In Congress, the "reversal" movement at first took the form of attempts to amend the Constitution.[2] These got nowhere. Litigants carried new cases to the Supreme Court in an effort to force a judicial retreat in the whole field of religious establishment. The Court stood its ground.[3] Most recently, in June 1973, a member of the House of

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[1] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[2] *See Hearings Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963); Note, *School Prayer and the Becker Amendment*, 53 GEO. L.J. 192, 217 nn.165-69 (1964).

[3] Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21 (Fla. 1963), *vacated and remanded for further consideration*, 374 U.S. 487, *aff'd*, 160 So. 2d 97 (Fla.), *rev'd per curiam*, 377 U.S. 402, *reh. denied*, 379 U.S. 871 (1964); *cf.* Epperson v. Arkansas, 393 U.S. 97 (1968); Walz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970); Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672, *reh. denied*, 404 U.S. 874 (1971).

Representatives announced that he was preparing a bill to take away the appellate jurisdiction of the Supreme Court in all cases involving school prayers.[4]

This last tactic presents a great and growing threat, far broader and more dangerous than the menace of government-enforced religiosity in the school system. For nearly the last two decades, effort after effort has been made in Congress to deprive the Supreme Court of appellate jurisdiction when lawmakers disagree sharply with controversial decisions, especially those involving civil liberties.[5] The most aggressive and dangerous of these, approved by the Senate Judiciary Committee, was a 1957 bill sponsored by Senator William E. Jenner of Indiana stripping the Supreme Court of jurisdiction over four important areas of libertarian dispute.[6] Unlike the move to amend the Constitution, enactment of a statute requires merely a simple majority in both houses, plus the President's signature, and the deed is done. The statute then would be subject to judicial review by a court hopefully endowed with sufficient fortitude and insight to invalidate it.

Unlike the tumult over executive privilege,[7] which turns on *implied* constitutional power,[8] the periodic efforts in Congress to restrict the Supreme Court's appellate jurisdiction hinge upon an *express* provision of the Constitution which at first glance appears to give Congress general authority in that field. Article III, section 2, extends the judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," and lists eight classes of cases. The section then describes the jurisdiction of the Supreme Court:

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[4] To date no such bill has been dropped into the House hopper; however, on January 3, 1973, Representative W. R. Archer of Texas introduced a bill to amend 28 U.S.C. § 1257 (1970) to provide that the Supreme Court shall not have jurisdiction to review a state court final judgment or decree that an act or publication is obscene. H.R. 81, 93d Cong., 1st Sess. (1973). On January 30, Representative Harold R. Collier of Illinois introduced a bill which would deny the Court appellate jurisdiction to review "any case in which the trial court has determined the legality of the apportionment of population" among House districts, under certain conditions. H.R. 3238, 93d Cong., 1st Sess. (1973). The temptation to control the Supreme Court is so great that Representative John R. Rarick of Louisiana has introduced a bill providing that the Court "shall not have appellate jurisdiction" to decide the unconstitutionality of any provision of a federal statute, state statute, or state constitution or to "reverse, alter, or modify" its own decisions or rules "except upon the concurrence of the full membership of the Court." H.R. 955, 93d Cong., 1st Sess. (1973).

Nevertheless, there have been introduced two Senate Joint Resolutions and five House Joint Resolutions to amend the Constitution regarding school prayer; five Senate and twenty-one House Joint Resolutions to provide for prayer in public buildings; and one House Joint Resolution concerning prayer at lawful assemblies. I CCH CONG. INDEX, 93D CONG. 256 (1973).

[5] *See generally* Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597, 605-07 (1958); McKay, *Court, Congress and Reapportionment*, 63 MICH. L. REV. 255 (1964).

[6] S. 2646, 85th Cong., 1st Sess. (1957). See text accompanying notes 119-20 *infra*.

[7] *See* Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044, 1086 (1965); Bishop, *The Executive's Right of Privacy*, 66 YALE L.J. 477 (1957).

[8] *See* Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 GEO. WASH. L. REV. 827, 898-99 (1961); Bishop, *supra* note 7, at 485.

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*[9]

The difficulty with the language embodying the Constitution's grant of appellate jurisdiction to the Supreme Court is that it is ambiguous, due to the unfortunate placement of the commas in the phrase "Jurisdiction, both as to Law and Fact, . . ." This punctuation makes the clause read as though "both as to Law and Fact" is parenthetical, and the modifying clause, beginning "with such Exceptions," attaches to "Jurisdiction."

Thus, looked at by itself, with no attention to constitutional debates and contemporaneous interpretations, the sentence last quoted appears to confer unlimited power upon Congress to take away the appellate jurisdiction of the Supreme Court. Under that interpretation it would be possible to deny litigants Supreme Court review in cases involving bills of attainder, ex post facto laws, freedom of speech, press and religion, unreasonable search and seizure, equal protection of the laws, right to counsel, and compulsory self-incrimination. In short, Congress could blot out the entire Bill of Rights, so far as the establishment of nationwide judicial standards is concerned.

Could the framers of the Constitution have intended to vest Congress with such a power of wholesale destruction?[10] Or was their debate on the clause limited to a different issue: should the Constitution fix the appellate jurisdiction of the Court to cover both law and fact in all cases, or should it leave the ultimate decision on that point to Congress? As this article will demonstrate, their intent was to fix firmly the Court's appellate jurisdiction; the "exceptions and regulations" which Congress was empowered to make were intended to extend only to review of facts, not to the entire grant of jurisdiction.

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[9] U.S. CONST. art. III, § 2 (emphasis added).

[10] One eminent authority states that the intent of the drafters of the Constitution was for the Supreme Court to have the power to curb Congressional excesses in appropriate "cases or controversies." R. BERGER, CONGRESS V. THE SUPREME COURT 8-16 (1969). "[I]f an attempt to exercise that power might in turn be blocked by Congress as a judicial 'excess,' then the [Constitutional] Convention was aimlessly going in circles." *Id.* at 286. *See generally* Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

## I

## THE INTENT OF THE FRAMERS

James Madison's "Virginia Plan,"[11] which was taken up in the Federal Convention of 1787 as the basis of discussion and action, called for a national judiciary in which "the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort" various specified cases "and questions which may involve the national peace and harmony."[12] The Committee of Detail, to which the revised Virginia Plan was submitted for expansion into the draft of a constitution, reported the judiciary article almost as it appears today. After defining the Supreme Court's original jurisdiction, the draft continued: "In all the other cases beforementioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make."[13]

Madison's *Notes of Debates* record that when the judiciary article came up for action by the Convention on August 27, Dr. Samuel Johnson of Connecticut "suggested that the judicial power ought to extend to equity as well as law—and moved to insert the words 'both in law and equity' after the words 'U.S.' " This was done.[14] After an intervening discussion, "Mr. Gouverneur Morris wished to know what was meant by the words 'In all the cases before mentioned it [jurisdiction] shall be appellate with such exceptions &c,' whether it *extended to matters of fact* as well as law—and to cases of Common law as well as Civil law."[15]

The answer came from James Wilson of Pennsylvania, principal architect of the draft reported by the Committee of Detail: "The committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed."[16] That court's sole function was to hear admiralty appeals coming from state courts.[17]

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[11] J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 30-33 (A. Koch ed. 1966) [hereinafter cited as MADISON].

[12] *Id.* at 32.

[13] *Id.* at 393.

[14] *Id.* at 536. The Committee on Style and Arrangement, in its report of September 12, 1787, shifted the words "in law and equity" to an earlier position in the sentence. *Id.* at 624.

[15] *Id.* at 539 (emphasis added).

[16] *Id.*

[17] Except in admiralty, a descendant of the civil law, no federal judicial power existed in the period of the Confederation. On November 25, 1775, the Continental Congress advised the several states to set up admiralty courts to handle all maritime cases, which mostly involved captures at sea, and provided "[t]hat in all cases an appeal shall be allowed to Congress, or such person or persons as they shall appoint for the trial of appeals . . . ." 3 JOURNALS OF THE CONTINENTAL CONGRESS 374 (1775). On January 30, 1777, the Congress created a standing committee of five "to hear and determine upon appeals brought against sentences based on libels in the

Action followed at once: "Mr. Dickinson [of Delaware] moved to add after the word 'appellate' the words both as to law & fact which was agreed to nem:con:"[18] Thus the clause came to read, "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, . . ." Had there been no discussion and no insertion, the original wording would have suggested unlimited power to make exceptions, even though the wording's purpose was narrower. The debate did not deal specifically with "exceptions." Instead, the entire discussion of the clause bore on inserting the phrase "law and fact." The emphasis of the debate, as guided by drafter James Wilson, was aimed at clarifying the all-inclusiveness of the Supreme Court's jurisdiction and showed nothing to alter the initial indications that the exceptions clause was confined to the scope of review of facts.

This initial understanding was confirmed a moment after Dickinson's motion, when an unidentified delegate moved to insert the following substitute for the clause on appellate jurisdiction: "In all the other cases before mentioned the Judicial power shall be exercised in such a manner as the Legislature shall direct."[19] The motion was defeated, six states to two.[20] This proposed clause would have given Congress the extensive power it claims it possesses under the authority to make exceptions from the appellate jurisdiction.[21] It is hardly conceivable that such a motion would have been offered if the delegates believed that they had just voted to confer substantially the same power under a different wording.

James Wilson restated and clarified the narrower construction of the exceptions clause in a statement to the Pennsylvania ratifying convention of December 1787. Quoting the clause on appellate jurisdiction, he explained why Congress was given power to make exceptions:

> The jurisdiction as to fact may be thought improper; but those possessed of information on this head see that it is necessary. We find it essentially necessary from the ample experience we have had in the courts of admiralty with regard to captures.[22]

He cited injustices dealt by juries in state courts of admiralty[23] because of diverse citizenship of prize claimants and continued:

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courts of Admiralty in the respective states, agreeable to the resolutions of Congress." 7 *id.* at 75 (1777). After much delay, the Congress established the Court of Appeals on January 15, 1780. 16 *id.* at 61-64 (1780).

[18] MADISON, *supra* note 11, at 539.

[19] *Id.*

[20] *Id.*

[21] See notes 118-34 *infra* and accompanying text.

[22] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 493 (2d ed. J. Elliot 1836) [hereinafter cited as Elliot's Debates].

[23] Conflicts over the distribution of wartime prize seizures were heard in the courts for about twenty-five years after the Revolutionary War ended. Disputes

> There are other cases in which [limitation of review of fact by Congress] will be necessary; and will not Congress better regulate them, as they rise from time to time, than could have been done by the Convention? Besides, if the regulations shall be attended with inconvenience, the Congress can alter them as soon as discovered. But any thing done in convention must remain unalterable but by the power of the citizens of the United States at large.[24]

Thus it appears, both from the debates and the post-Convention testimony of the judiciary article's principal architect, that the framers thought it unwise to give the Supreme Court uncheckable authority in the controversial area of "law and fact" at a time of piled-up litigation over wartime prizes and unwise to implant unchangeable regulations on that subject in the Constitution. Therefore they gave Congress discretionary power to make exceptions to review of facts.

Wilson's view of the exceptions clause, as limited to review of "law and fact," is strikingly supported by the earliest full exposition of the judiciary article, that of Alexander Hamilton in *The Federalist*.[25] In *The Federalist No. 81* Hamilton briefly discussed the original jurisdiction of the Supreme Court, then turned to other "cases of federal cognizance," in which the Court "would have nothing more than an appellate jurisdiction, 'with such *exceptions* and under such *regulations* as the Congress shall make.'[26]

"The propriety of this appellate jurisdiction," wrote Hamilton, "has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact."[27] By necessity speaking hypothetically, he set forth the "train of ideas [which] may well be imagined to have influenced the convention in relation to this particular provision."[28] The Supreme Court's appellate

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raged over which privateer captured what British merchant ship. *See, e.g.*, United States v. Judge Peters, 9 U.S. (5 Cranch) 115 (1809). *See also* 16 JOURNALS OF THE CONTINENTAL CONGRESS 61-62 (1780).

[24] 2 Elliot's Debates, *supra* note 22, at 494.

[25] THE FEDERALIST Nos. 78-81 (A. Hamilton).

[26] THE FEDERALIST No. 81, at 488 (New Am. Library ed. 1961) (A. Hamilton).

[27] *Id.*

[28] *Id.* at 490. The Federal Convention on its second working day, May 29, 1787, adopted a rule "[t]hat nothing spoken in the House be printed, or otherwise published or communicated without leave." MADISON, *supra* note 11, at 28. The purposes of the rule were to avoid stirring public controversy and to allow flexibility of position for delegates. On the day of final adjournment, September 17, 1787, the Convention resolved that the President (George Washington) "retain the Journal and other papers, subject to the order of the Congress, if ever formed under the Constitution." *Id.* at 659. The motive, stated by Massachusetts delegate Rufus King, was fear that "a bad use would be made of them by those who would wish to prevent the adoption of the Constitution." *Id.* at 658-59. Congress did not authorize publication of the Journals until 1819. Madison refused to permit publication of his voluminous *Notes of Debates* until after his death, giving all reasons except the principal one—that he dared not expose his 1787 hostility to state sovereignty to his impassioned fellow Virginians. His *Notes* were published in 1840. Hamilton was presenting what he knew to be the thoughts of the convention, but he, as a delegate, obeyed the secrecy rule.

jurisdiction, "it may have been argued," would extend to some cases arising in the common law, some in the civil law. In some of the latter, such as prize causes, re-examination of the facts might be essential to preservation of the public peace.[29] Owing to conflicting practices of the states, it was not feasible to place in the Constitution "an express exception of cases" originally tried by a jury.[30] Consequently he surmised (actually he knew) that the convention reached this conclusion:

> To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature shall prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.[31]

Hamilton earlier had provided cogent reasons for *unrestricted appellate jurisdiction* in *The Federalist No. 80*, in which he justified the power of the federal courts to overrule state laws conflicting with the Articles of Union. The Constitution, he pointed out, prohibited the states from doing a variety of things, but "No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them."[32] The federal courts must have power to overrule state contraventions of the Articles of Union, because

> [t]he mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.[33]

Both in wording and logic, that statement is an equally forceful warning against giving final jurisdiction on constitutional questions to the inferior courts of the federal judiciary. Today's eleven independent federal courts of appeals given "final jurisdiction over the same causes, arising upon the same laws" would be no less a "hydra in government."

Thus Hamilton provided a credible rationale to support the drafters' intent and expressly limited the exceptions Congress could make to "appellate Jurisdiction, both as to Law and Fact" to review of questions of fact, the same explanation that Wilson gave during the Pennsylvania ratifying convention. Both explanations are in harmony with Wilson's remarks during the framing of the Constitution and with the convention's overwhelming rejection, that same day, of a motion to give Congress the extensive supervisory power over appellate jurisdiction it claims it possesses by virtue of the exceptions clause.[34]

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[29] THE FEDERALIST No. 81, *supra* note 26, at 490.

[30] *Id. See* R. BERGER, *supra* note 10, at 287-89, in which the author outlines the strong reaction among the drafters to the possibility of Supreme Court usurpation of the jury's function and concludes that "discussion of the 'exceptions' power in the Ratification conventions revolved almost exclusively about the retrial of facts found by a jury." *Id.* at 289. *See also* THE FEDERALIST No. 83 (A. Hamilton).

[31] THE FEDERALIST No. 81, *supra* note 26, at 490 (emphasis in original).

[32] *Id.*, No. 80 at 475-76.

[33] *Id.* at 476.

Convincing support of the Wilson-Hamilton interpretation of the exceptions clause was furnished by George Mason of Virginia in a proposed revision of it. Mason, after helping to frame the Constitution, refused to sign it[35] and opposed ratification, for reasons unrelated to the judiciary article.[36] Near the close of the Virginia ratifying convention, to insure an affirmative majority, Madison, John Marshall and other nationalist leaders helped to adopt a resolution drafted by Mason and Patrick Henry submitting twenty proposed constitutional amendments to Congress.[37] Number fourteen, supplied by Mason, was a revision of the judiciary article.

As in the Constitution submitted to the states, Mason's amendment extended the judicial power to "all cases in Law and Equity." Omitted were controversies between a state and citizens of another state or foreign countries.[38] Then came a revision of the clause on appellate jurisdiction:

> In all other Cases before mentioned, the Supreme Court shall have appellate jurisdiction as to matters of law only—except in cases of equity, and of admiralty and maritime Jurisdiction in which the Supreme Court shall have appellate Jurisdiction both as to law and fact, with such exceptions and other regulations as the Congress may make.[39]

The original draft of this resolution, in unidentified handwriting, lies in the papers of George Mason in the Library of Congress. The wording proves it to be of post-framing origin: a textual error ("Supreme Court of Congress"), corrected by Mason, points to the drafter's general but not specific knowledge of the framing. Mason himself added the final clause about "exceptions."

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[34] See text accompanying notes 16-21 *supra.*

[35] MADISON, *supra* note 11, at 651, 659.

[36] Mason cited several minor objections to the Constitution, including its sanction of standing armies, *id.* at 639, but the decisive one was the power of Congress "by a bare majority to pass navigation acts" instead of by a two-thirds vote. Because the "Eastern States" (as those of the North then were called) were the most populous, this power "would enable a few rich merchants in Philadelphia N. York & Boston, to monopolize the Staples of the Southern States & reduce their value perhaps 50 Per Cent . . . ." *Id.* at 650.

[37] RATIFICATION OF THE CONSTITUTION BY THE SEVERAL STATES, ARRANGED IN THE ORDER OF THEIR RATIFICATION, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1031-34 (C. Tansill ed. 1927) [hereinafter cited as Tansill].

[38] Mason feared the federal courts would enforce provisions of the 1783 treaty of peace concerning recovery of British property confiscated by Virginia during the Revolution. 3 Elliot's Debates, *supra* note 19, at 620. The eleventh amendment to the Constitution, which closed the federal courts to suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," was ratified in 1795.

[39] Tansill, *supra* note 37, at 1032-33.

This proposed revisal indicates that both Mason and the unidentified drafter understood the Convention's concern over the Supreme Court's appellate jurisdiction to apply only to matters of "law and fact." Mason's explicit exceptions clause underscores the intended limits of congressional regulation of that jurisdiction. The offering of the amendment supports Hamilton's report of loud clamors on the subject. The rewording forbade the Supreme Court to review matters of fact in cases at law and empowered Congress to make exceptions to review of fact questions in equity, admiralty, and maritime cases. Thus, Mason's amendment stresses the limits of the ratified Constitution's exceptions clause while proposing to narrow the Court's appellate jurisdiction still more, wholly away from the review of matters of fact in law cases.[40]

Put together the harmonious testimony of Dr. Johnson, Gouverneur Morris, James Wilson, Alexander Hamilton, and George Mason and his unidentified colleague, and witness the total absence of opposing interpretations. Proof appears conclusive that the sole purpose of the exceptions clause was to permit Congress to limit appellate jurisdiction over questions of fact in cases at law. When that background is taken into account, any linguistic ambiguity disappears.

## II

## THE EARLY YEARS

### *A. The Drafting of the Judiciary Act*

The First Congress of the United States passed the Judiciary Act of 1789,[41] drafted principally by judiciary committee chairman Oliver Ellsworth and William Paterson, two framers of the Constitution who ultimately became Supreme Court justices. This law set up the Supreme Court,[42] three circuit courts[43] exercising both appellate and original jurisdiction,[44] and federal district courts.[45]

Instead of resting the appellate jurisdiction of the Supreme Court on the constitutional declaration, the Act of 1789 spelled out that jurisdiction to the last thought-of detail.[46] This contributed later to the broad interpretation of the exceptions clause.[47] There were, however, strong reasons in public policy for that constitutionally superfluous course.

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[40] The thrust of Mason's amendment is embodied in the seventh amendment to the Constitution, ratified in 1791, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[41] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[42] *Id.* § 1.

[43] *Id.* § 4.

[44] *Id.* §§ 11, 21.

[45] *Id.* § 2.

[46] *Id.* § 25. That section provided for Supreme Court review of final state court judgments where the validity of a federal treaty or statute was challenged, and the decision was against their validity; where a state statute or exercise of authority was challenged as repugnant to the federal constitution, a treaty, or law, and the decision was in favor of their validity; and where construction of the

The federal judiciary until 1789 had consisted of a court of appeals from state courts of admiralty.[48] The decisions of that federal court had been violated with impunity by Pennsylvania and New Hampshire.[49] During the fight over ratification of the new Constitution, hobgoblins of judicial tyranny had been conjured up by the opponents of a strong central government.[50] Had the appellate jurisdiction not been spelled out, every exertion of authority in a new field would have produced outcries against usurpation. The Judiciary Act of 1789, passed by Congress and signed by the President, put the united weight of the legislative and executive departments behind a judiciary of enormously expanded authority. The Supreme Court, instead of defining and defending its appellate jurisdiction when challenged by individuals or by states, could point to specific provisions in the statute that brought the Court into existence. This was a support of incalculable value in its first stormy half-century.

The record of House debate on the Judiciary Bill (Senate debates in that day were not recorded) contains no reference to the exceptions clause, but all the implications to be drawn from the record are against its unlimited scope. Almost the sole matter at issue was whether original federal jurisdiction below the Supreme Court level should be vested in inferior federal courts or entrusted to state judges bound by oath to uphold the federal Constitution.[51] If state courts were so used, said Representative William Smith of South Carolina, "an appeal must lie in every case" to the judicial courts of the United States, "otherwise the judicial authority of the Union might be altogether eluded."[52]

> To deny such an appeal, would be to frustrate the most important objects of the Federal Government, and would obstruct its operations. The necessity of uniformity in the decisions of the Federal courts is obvious; to assimilate the principles of national decisions, and collect them, as it were, into one focus, appeals from all the State courts, to the Supreme Court would be indispensable.[53]

Opponents of inferior federal courts sought to turn this argument back upon its advocates. State judges could be trusted, declared Repre-

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federal constitution, treaty, or statute was challenged, and the decision was against the right specially claimed by either party thereunder. *See also id.* § 22.

[47] *See* text accompanying notes 75-77 *infra.*

[48] See note 17 *supra.*

[49] United States v. Judge Peters, 9 U.S. (5 Cranch) 115 (1809); Penhallow v. Doane's Adm'r, 3 U.S. (3 Dall.) 54 (1795). *See* I. BRANT, JAMES MADISON AND AMERICAN NATIONALISM 34, 132-35 (1968).

[50] *See* 3 Elliot's Debates, *supra* note 19, at 274, 521-22, 530, 539-46, 552-62.

[51] *See* 1 ANNALS OF CONG. 784-85, 796-833 (1789).

[52] *Id.* at 798.

[53] *Id.*

sentative James Jackson of Georgia, but if not, "does there not remain the appellate jurisdiction of the Supreme Court to control them, and bring them back to their reason?"[54] Smith, upon resuming his argument, contended that "[i]f we have a Government pervading the Union, we must have a judicial power of similar magnitude. . . ."[55] Thus speakers on both sides grounded their positions on an appellate jurisdiction of the Supreme Court reaching every case—a principle of uniformity applying as much to control of inferior federal courts as to control of state courts.

### *B. The Genesis of the Threat*

The equity case of *Wiscart v. D'Auchy*[56] brought the congressional delineation of jurisdiction to the Supreme Court in its 1796 session. The six-judge Court included three framers of the Constitution: Oliver Ellsworth, appointed Chief Justice that year, and the veterans James Wilson and William Paterson. These three men were well fitted to agree or disagree, knowledgeably, about the exceptions clause. Wilson and Ellsworth had been members of the 1787 Committee of Detail which produced the clause; Wilson had explained it in both the Constitutional Convention and the Pennsylvania ratifying convention; Ellsworth and Paterson had drafted the Judiciary Act of 1789, which itemized appellate jurisdiction; Paterson had just written the landmark opinion in the great case of *Penhallow v. Doane's Administrator*,[57] which applied the principle that judicial supremacy over the states existed from the beginning of the Revolution.

*Wiscart v. D'Auchy*[58] involved a charge of fraudulent conveyance of real and personal property. The issue squarely presented to the Court, and argued by counsel, was whether the description of fraud in the decree of the circuit court fulfilled the requirements of section 19 of the Judiciary Act[59] as a statement of facts and whether as a statement it was conclusive.[60] The Court unanimously held both questions should be answered in the affirmative,[61] stating as its first rule:

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[54] *Id.* at 803.

[55] *Id.* at 816.

[56] 3 U.S. (3 Dall.) 321 (1796).

[57] 3 U.S. (3 Dall.) 54 (1795).

[58] 3 U.S. (3 Dall.) 321 (1796).

[59] Section 19 provided "[t]hat it shall be the duty of circuit courts, in causes of equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court." Act of Sept. 24, 1789, ch. 20, § 19, 1 Stat. 73.

[60] 3 U.S. (3 Dall.) at 322. Justice James Iredell, who heard the case in the circuit court, said in a footnote, "The Court below did not intend that the Decree in this case should have the force of a statement of facts, but transmitted the

[61] *Id.* at 324, 330.

> If causes of equity or admiralty jurisdiction are removed hither, accompanied with a statement of facts, but without the evidence, it is well; and the statement is conclusive as to all the facts, which it contains.[62]

The Court disagreed, however, as to the import of sections 21 and 22 of the Act regarding review by appeal or writ of error, an issue wholly unrelated to the disposition of the case.[63] Ellsworth stated the difference between the two processes, of Roman and British origin, respectively:

> An appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact as well as the law, to a review and re-trial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law.[64]

Section 21 of the Judiciary Act of 1789 provided that admiralty cases were to be carried from the federal district court to the circuit court by appeal (thus allowing review of facts as well as law),[65] but section 22 stated that "civil actions" generally were to be carried from the circuit court to the Supreme Court by writ of error (thus excluding review of facts).[66] These rules were fully within the power given Congress to make exceptions as to "law and fact," but Ellsworth in interpreting the statute gratuitously included admiralty cases in "civil actions" and pronounced a second rule to forbid review of fact in admiralty, where such review had been almost universal:

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record according to its present form, merely in compliance with the precedents established in other circuits." *Id.* The record in the case, brought to the Court by writ of error, contained the pleadings, the decree, the depositions, and the testimony taken at trial.

[62] *Id.* at 324.

[63] Counsel for the defendant in error argued that the circuit court could state the case by sending up the entire record. He relied on two admiralty cases, Talbot v. Janson, 3 U.S. (3 Dall.) 133 (1795) (writ or error in the nature of an appeal), and Hills v. Ross, 3 U.S. (3 Dall.) 184 (1796), *rev'd on rehearing after Wiscart*, 3 U.S. (3 Dall.) 331 (1796) (writ of error), in each of which there was no statement of facts presented to the court, "and the question now agitated was started; but the Counsel, in deference to what seemed to be the opinion of the Bench, waved [sic] the objection, and proceeded upon the evidence at large, as transmitted with the record." *Id.* at 322.

[64] *Id.* at 327.

[65] Act of Sept. 24, 1789, ch. 20, § 21, 1 Stat. 73, which provided that "from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court, to be held in such district."

[66] *Id.* § 22, which provided that "final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, . . . And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, . . ."

> If such causes [of equity or admiralty jurisdiction] are removed [hither] with a statement of the facts, and also with the evidence;—still the statement is conclusive, as to all the facts contained in it.[67]

A dispute ensued whether to accept Ellsworth's position on the nature and construction of the exceptions clause and sections 21 and 22 of the Act which centered on the method of allowing admiralty causes to be brought to the Court. On that issue the Court divided four to two in favor of following Ellsworth. Ellsworth and Paterson, the two drafters of the Act of 1789, took opposite sides. The three framers of the Constitution divided two to one, Ellsworth binding the appellate jurisdiction of the Court to his interpretation of the nature of the exceptions clause relative to the Act, Wilson and Paterson basing appellate jurisdiction on the Constitution alone.[68] The result was a debate between Ellsworth and Wilson, speaking in successive opinions.

Immediately after hearing Ellsworth pronounce the second rule Wilson launched into his opinion.[69] He started discussion with the conceded merits of the appeals process in admiralty and rose to challenge the power of Congress to override the Constitution:

> For my part, I concur in the opinion that, notwithstanding the provisions of the judicial act, an appeal is the natural and proper mode of removing an admiralty cause, and, in that case, there can be no doubt, that all the testimony which was produced in the court below, should also be produced in this court. Such an appeal is expressly sanctioned by the Constitution; it may, therefore, clearly in the first view of the subject, be considered as the most regular process; and as there are not any words in the judicial act restricting the power of proceeding by appeal, it must be regarded as still permitted and approved. *Even, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision.*[70]

In that minority view Wilson denied the power of Congress to rule at will over the Supreme Court's appellate jurisdiction either by silence or by express prohibition.[71]

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[67] Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 324 (1796).

[68] Justice Paterson did not express himself in *Wiscart* but the next year wrote in Jennings v. The Brig Perserverance, 3 U.S. (3 Dall.) 336, 337 (1797), "Though I was silent on the occasion, I concurred in opinion with Judge Wilson upon the second rule laid down in *Wiscart v. D'Auchy*; and, of course, the court were divided, four to two, upon the decision." He reluctantly adhered to that rule in *Jennings.*

[69] Customarily, in the early days of the Supreme Court, the Justices delivered their opinions seriatim. Wilson's unusual interruption probably reflected that Ellsworth's opening remarks disposed of the case. Ellsworth's second rule was unnecessary to the decision, and it prompted Wilson to engage in a running debate.

[70] Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 325 (1796) (emphasis added).

[71] Wilson's declaration contained the germinal seed of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803), where Chief Justice Marshall stated: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the

Later in the opinion he affirmed congressional authority to make exceptions and regulations to questions of fact in law cases. To counter the majority's contention that the silence of the Judiciary Act on "appeal" constituted an "exception,"[72] Wilson quoted the Constitution's wording on "appellate Jurisdiction, both as to Law and Fact," and proceeded:

> The appellate jurisdiction, therefore, flowed, as a consequence, from this source; nor had the Legislature any occasion to do, what the Constitution had already done. The Legislature might, indeed, have made exceptions [as to "law and fact"] and introduced regulations upon the subject; but as it has not done so, the case remains upon the strong ground of the Constitution, which in general terms, and on general principles, provides and authorizes an appeal; the process that, in its very nature (as I have before remarked) implies a re-examination of the fact, as well as the law.[73]

In closing, Wilson grounded his argument on national security and welfare, both domestic and foreign, in terms that appeared to forbid a grant of power to Congress to make limitless exceptions from the Court's appellate jurisdiction:

> This construction, upon the whole, presents itself to my mind; not only as the natural result of a candid and connected consideration of the Constitution and acts of Congress; but as a position in our system of jurisprudence, essential to the security and dignity of the *United States*. And if it is of moment to our domestic tranquillity, and foreign relations, that causes of Admiralty and Maritime jurisdiction, should, in point of fact as well as of law, have all the authority of the decision of our highest tribunal; and if, at the same time, we find it sanctioned by the supreme law of the land; I think the jurisdiction ought to be sustained.[74]

Chief Justice Ellsworth then spoke for the majority. He took the simple position that Congress (including himself as committee chairman) had spoken, and the Supreme Court must obey. The Act of 1789, he asserted, went into detail concerning writs of error in admiralty cases brought up from circuit court but was silent as to appeals.[75] Appellate jurisdiction as a whole, Ellsworth emphasized, was given "with such exceptions, and under such regulations, as the Congress shall make."[76] Specification of a rule excepted all others:

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theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

"This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society."

Marshall had too good an opinion of himself to seek support in the prior utterances of others.

[72] See text accompanying note 77 *infra*.

[73] 3 U.S. (3 Dall.) at 326.

[74] *Id.* at 327.

[75] See notes 65 and 66 *supra*.

[76] 3 U.S. (3 Dall.) at 327.

> Here then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?[77]

Ellsworth felt compelled to answer a point of construction of the Act of 1789 which Wilson thought should open the way to admiralty appeals without express congressional "authorization."[78] The Chief Justice countered this,[79] but he was moved to modify his position conditionally:

> If, however, the construction, that a statement of facts by the Circuit Court is conclusive, would amount to a denial of justice, would be oppressively injurious to individuals, or would be productive of any general mischief, I should then be disposed to resort to any other rational exposition of the law, which would not be attended with these deprecated consequences. But, surely, it cannot be deemed a denial of justice that a man shall not be permitted to try his cause two or three times over.[80]

Ellsworth was saying, in effect, that if his interpretation of the exceptions clause would deny justice to an appellant or would produce serious damage to the nation, he would abandon the binding force of this section of the Judiciary Act. But if he could abandon *any* part of the Act's specification of appellate jurisdiction, for any reason, *no* part of it could have binding constitutional force. The Constitution would triumph over the statute.

This was the closest Ellsworth came to dealing with the peril to the nation which Wilson predicted would result from wrapping the Supreme Court's appellate jurisdiction in a congressional straitjacket. Compare Ellsworth's position with the warning words, prophetic of twentieth century challenges to the Court's jurisdiction, with which Justice Wilson opened his dissent:

> I consider the rule established by the second proposition to be of such magnitude, that being in the minority on the decision, I am desirous of stating, as briefly as I can, the principles of my dissent.
>
> The decision must, indeed, very materially affect the jurisdiction of all the

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[77] *Id.*

[78] Wilson construed sections 21 and 22 together and concluded that, because section 22 made no mention of admiralty appeals but dealt with "civil actions" generally, which could be removed from the district courts by *writ of error* and "by like process" could be taken to the Supreme Court, Congress had not intended to make exceptions to review of fact in review of admiralty causes. Section 21 dealt with admiralty *appeals* to the circuit court, and Wilson considered them excluded from the first part of section 22 concerning "civil actions" generally. By necessity, he concluded, they were to be excluded from the second part of section 22. *Id.* at 325-27.

[79] Ellsworth considered "civil actions" to include admiralty causes, *id.* at 327-28, because "civil actions" was "employed in contradistinction to criminal prosecutions." *Id.* at 328.

[80] *Id.* at 328-29.

> courts of the United States, particularly of the Supreme Court, as well as the general administration of justice.[81]

Concede that Ellsworth was right concerning the application of sections 21 and 22 to review of fact in admiralty cases brought to the court, which rule is within the true "exceptions" power. Constitutional law has been distorted by his view that, the Court's appellate jurisdiction having been spelled out by Congress, exceptions to jurisdiction not specified are created by congressional silence. That position, in conflict with the history, and the contemporaneous interpretations of the exceptions clause, rejected by Justice Wilson and by fellow-framer Paterson, half-abandoned by Ellsworth himself, has been accepted for more than 175 years as a binding precedent, to fortify the congressional claim of power to make any exceptions it pleases to the Supreme Court's appellate jurisdiction.

### C. *The Trend Continues*

Chief Justice Marshall gave a second, strong push in the direction of distortion when the otherwise trivial case of *Durousseau v. United States*,[82] involving disputed prize money, came before the Supreme Court in its 1810 term. On the point of exceptions to the Court's jurisdiction resulting from congressional silence Marshall wrote (apparently to absorb the impact and clarify the ruling of *Wiscart*):

> The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.
>
> When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.[83]

Thus Marshall based his position on *Wiscart v. D'Auchy*[84] without naming the case. He took no account of Wilson's powerful dissent, endorsed by Paterson, from Ellsworth's dicta nor of Ellsworth's conditional partial abandonment of his own position. Furthermore, the revealing debate in the Federal Convention was unknown to him, because Madison's *Notes* were not to be published for another thirty years.[85] More importantly, these early cases denying jurisdiction involved nothing but technical trivialities irrelevant to the national welfare and the fundamentals of government. None of them treated the situation that now confronts the nation—the threatened misuse of the exceptions clause to frustrate vital constitutional mandates.

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[81] *Id.* at 324.
[82] 10 U.S. (6 Cranch) 307 (1810).
[83] *Id.* at 314.
[84] 3 U.S. (3 Dall.) 321 (1796).
[85] See note 28 *supra*.

### *D. The Threat Realized*

Such a threat was brought into view conjecturally in *Martin v. Hunter's Lessee*,[86] a landmark case which nailed down the power of the Supreme Court to issue writs of error to state supreme courts on constitutional issues. Not only could such writs be issued by the Supreme Court, said Justice Joseph Story, but

> [t]here can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction.[87]

Power to distribute original and appellate jurisdiction among inferior courts (which is exactly what Congress did when it organized the present judiciary's structure) is a far cry from the power to confine final appellate jurisdiction to inferior courts, as a broad use of the exceptions clause would do. On the subject of Congress's power over the judiciary, Justice Story took a very different approach. The federal judiciary, he observed, was given jurisdiction over two classes of cases, those with and those without a profound bearing on national safety and interest. Unacquainted with the still secret 1787 Convention debates,[88] he conjectured as follows concerning the purpose of the exceptions clause in the two classes of cases:

> In respect to the [profoundly important] first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases;* and in the latter class [of unimportant cases] to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.
>
> The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. . . . All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied and, of course, should extend to all cases whatsoever.[89]

In contrast, said Story, a "different policy might well be adopted in reference to the second class of cases,"[90] chiefly involving citizens' disputes. The judicial power with reference to them "might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply."[91]

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[86] 14 U.S. (1 Wheat.) 304 (1816).

[87] *Id.* at 338.

[88] See note 28 *supra.*

[89] 14 U.S. (1 Wheat.) at 334-35.

[90] *Id.* at 335.

The framers, as we know from Madison's *Notes of Debates*, drew no such distinction between cases of national and local significance but discussed only "law and fact" in dealing with the exceptions clause.[92] Story made his surmise because he himself recognized the imperative necessity of an irremovable appellate jurisdiction in the Supreme Court over all cases that had a profound bearing on national interest and safety. The entire attitude of the Convention delegates, in framing the Constitution, was in harmony with Story's opinion. Every argument he advanced against exemption of state courts from federal appellate jurisdiction applies with full force against a general congressional power to exempt inferior federal courts from the appellate jurisdiction of the Supreme Court.

Chief Justice Marshall took no part in deciding *Martin v. Hunter's Lessee* because he had a financial stake in the decision. Marshall's whole judicial career, however, put him in harmony with Story's belief that the framers intended the Court's appellate jurisdiction to extend without restraint to "all cases whatsoever" that affect national policy, national rights, or national sovereignty.[93] There is no genuine conflict between this and Marshall's inferentially contrary holding in *Durousseau*, which dealt with matters unrelated to national policy or basic division of the powers of government.

There is, however, a fundamental and unsolvable conflict between Marshall's *Marbury* doctrine of judicial review and a general power in Congress to make exceptions from appellate jurisdiction. How would Chief Justice Marshall have reacted to a congressional act prohibiting review of cases arising out of the clause prohibiting bills of attainder and ex post facto laws? In *Marbury v. Madison*,[94] Marshall used that very clause as an illustration to combat the fallacy that when there is a conflict between the Constitution and a law, the "courts must close their eyes on the constitution and see only the law."[95] Said the Chief Justice:

> This doctrine would subvert the very foundation of all written constitutions. . . . The constitution declares "that no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?[96]

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[91] *Id.* at 336.

[92] See text accompanying notes 14-21 *supra.*

[93] *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). *See also* note 71 *supra.*

[94] 5 U.S. (1 Cranch) 137 (1803).

[95] *Id.* at 178.

[96] *Id.* at 178, 179.

There is no essential difference, in nature or in consequences, between passage by Congress of a bill of attainder or ex post facto law which the Supreme Court has no express or implied constitutional power to review and passage of one which the court is forbidden to review by an act of Congress taking away jurisdiction.

Such is the early record of judicial interpretation of the exceptions clause: an interpretation conflicting with the debates of the framers in the 1787 Convention, contrary to framer Alexander Hamilton's exposition of it in *The Federalist*, contrary to framer James Wilson's description in the Pennsylvania convention, refuted by framer George Mason's proposed revision of the judiciary article, pulverized by framers Wilson and Paterson in *Wiscart*, overset in theory by Justice Story's collateral reasoning, destructive of the principle of judicial review, conflicting fundamentally with the Constitution as a whole and particularly with the Bill of Rights. This fallacious interpretation has come down to modern times without a solitary judicial glance at its potentially devastating effect upon the nation. Applied harmlessly in early cases of trivial import, it now looms up as a potential "hydra in government" within the scope of Hamilton's warning. Congressional power to hamstring the Supreme Court would be power to destroy the Constitution and rupture the national union.

## III

## MODERN TIMES

"Modern times" date from 1866, when a passion-ridden Congress began the military rule of eleven defeated secessionist states and set up military commissions to rule the South. The Radical Republican congressional majority dominated by Pennsylvania Representative Thaddeus Stevens feared that Southern judges, rejecting writs of habeas corpus, would hold Union sympathizers and ex-slaves in jail. Searching the Judiciary Act of 1789, Senate Stevensites found that all federal judges were given original jurisdiction to issue habeas corpus writs,[97] but nowhere was there a specification of appellate power in that field.[98] This meant, under the rulings in *Wiscart* and *Durousseau*, that Congress had excepted the Supreme Court's power because it was not specified: Southern state court judges could violate civilian rights with impunity.

To forestall this, Congress immediately passed a bill conferring appellate jurisdiction in habeas corpus cases upon the Supreme Court.[99] It became law on February 5, 1867. On November 12 of that year the Federal Circuit Court for the District of Mississippi issued a writ of habeas corpus upon the petition of William H. McCardle, who had been imprisoned by the military commander for an inflammatory editorial in his newspaper. The court heard arguments, discharged the writ, and returned McCardle to custody. McCardle took his appeal to the Supreme Court.[100]

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[97] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73.

[98] CONG. GLOBE, 39th Cong., 1st Sess. 4228-30 (1866).

[99] Act of Feb. 5, 1867, ch. 27, 14 Stat. 385.

This development, squarely reversing the intended effect of the new law conferring habeas corpus jurisdiction, aroused the Radical Republicans to action. Their first step was judicial. Senator Lyman Trumbull of Illinois headed a battery of lawyers who moved to dismiss the McCardle appeal for lack of jurisdiction in the circuit court; because of this, they argued, the Supreme Court could not entertain jurisdiction. Chief Justice Salmon P. Chase, speaking for a unanimous court, swept this aside.[101] Thus, on February 17, 1868, the Supreme Court asserted its appellate jurisdiction in habeas corpus cases and opened the way to arguments on the merits of McCardle's appeal.

In the meantime, dramatic events were taking place in a related area. On January 30 the House of Representatives launched an impeachment inquiry into the conduct of Supreme Court Justice Stephen J. Field, who was reported to have remarked at a dinner table that all of the Reconstruction Acts were unconstitutional and would be held so by the Court.[102] On February 24, however, the House impeached President Andrew Johnson[103] and subsequently forgot Justice Field.

One week later, in the face of this congressional fury, the Supreme Court heard arguments for and against the release of McCardle. Before conference on the case began. Congress reacted by repealing the 1867 law which conferred jurisdiction in habeas corpus cases.[104] President Andrew Johnson vetoed the bill.[105] Congress promptly overrode the veto, thereby, said Congressman George W. Woodward of Pennsylvania (former chief justice of his state), putting into effect a law making the legislature supreme,

> which I say is a repeal of the Constitution of the United States and a consolidation of all the political power of this Government into the hands of a legislative oligarchy to be wielded I know not by whom.[106]

*McCardle* lay fallow while Chief Justice Chase presided over the impeachment trial of President Johnson. Then it was reargued before justices who had good reason to believe that they would be impeached if they set McCardle free. The petitioner lost, and Lincoln's Secretary of the Navy Gideon Welles wrote in his diary: "The judges of the Supreme Court have caved in, fallen through, failed in the *McCardle Case*."[107] Former Justice Benjamin R. Curtis had a similar feeling but widened the blame: "Congress, with the acquiesence of the country, has subdued the Supreme Court as well as the President."[108]

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[100] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 320 (1868) (statement of facts).

[101] *Id.* at 324-27 (opinion of the court).

[102] CONG. GLOBE, 40th Cong., 2d Sess. 862-63 (1868). *See* 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 193 n.1 (1922).

[103] CONG. GLOBE, 40th Cong., 2d Sess. 1400-02 (1868).

[104] Act of March 27, 1868, ch. 34, 15 Stat. 44.

[105] In his veto message President Johnson with accurate foresight said that the bill revoking appellate jurisdiction over habeas corpus "establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation." CONG. GLOBE, 40th Cong., 2d Sess. 2094 (1868).

[106] *Id.* at 2168.

Citing *Wiscart* and *Durousseau*, Chief Justice Chase wrote that the affirmative jurisdiction in the Judiciary Act of 1789 "has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."[109] The habeas corpus exception was not such an inference. The Act of March 28, 1868,[110] expressly repealed the appellate jurisdiction conferred by the Act of February 5, 1867. It was "hardly possible to imagine a plainer instance of positive exception,"[111] and the Court was "not at liberty to inquire into the motives of the legislature."[112]

Such is the background, from 1787 to 1869, for mid-twentieth century attempts to take away the appellate power of the Supreme Court whenever an impassioned congressional faction is stirred to anger by decisions enforcing constitutional, rights and liberties. The principal force behind this interpretation of the Constitution was the acceptance by Chief Justice Marshall in *Durousseau* of Ellsworth's holding that congressional definition of appellate jurisdiction implies the absence of any jurisdiction not set forth by statute. This backhanded approach has led to complete avoidance of the fundamental question of the scope of the exceptions clause. Not once has any thought been given, by advocates of restriction, to the breakdown of national unity, the paralysis of national authority, the destruction of judicial unity in guaranteeing rights and liberties, all in violation of the basic provisions of Article III and the Bill of Rights, that would result from a broad application of the exceptions clause.

Can anyone believe that the Marshall Court would have ruled as it did in *Durousseau*, if, instead of a procedural triviality, the Court had been faced with an attempt to overthrow the monumental decisions of *McCulloch v. Maryland*[113] and *Cohens v. Virginia*,[114] which fulfilled the framers' design of building national power and cohesion into the structure of government? Suppose that Congress, sharing the fear-inspired ferocity of state Judge Spencer Roane of Virginia,[115] had repealed section 25 of the 1789 Judiciary Act, which empowered the Supreme Court to review final decisions of the highest state courts by writs of error where federal questions are involved.[116] What if Congress had positively forbidden the Supreme Court to review state court decisions? Would Marshall and his fellow justices supinely have yielded to that method of destroying the American union? Read what James Madison wrote with specific reference to Roane's campaign against Supreme Court review of state court decisions:

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[107] Quoted in 3 C. WARREN, *supra* note 102, at 205.

[108] E. BATES, THE STORY OF THE SUPREME COURT 180 (1936).

[109] *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513 (1869).

[110] Act of March 27, 1868, ch. 34, 15 Stat. 44.

[111] 74 U.S. (7 Wall.) at 514.

[112] *Id.*

[113] 17 U.S. (4 Wheat.) 316 (1819).

[114] 19 U.S. (6 Wheat.) 264 (1821).

> Take the linch-pins from a carriage, and how soon would a wheel be off its axle; an emblem of the speedy fate of the federal system, were the parties to it loosened from the authority which confines them to their spheres.[117]

Until 1840, the "law and fact" origin of the exceptions clause was hidden in Madison's unpublished *Notes*, but Marshall would not have needed them. Having by daring and dazzling reasoning established the power of the Supreme Court to declare acts of Congress unconstitutional, would he have capitulated to a legislative fiat turning the Constitution into twenty-nine (now fifty) discordant and unenforceable charters of pretended national government? Had Chief Justice Chase and his colleagues in *McCardle* been free of the impeachment threat, and had they been ruled by the governing principles of the Marshall Court, their decision in *McCardle* might well have run something like this:

> Article I, section 2, of the Constitution commands that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." So long as the privilege of habeas corpus is not suspended, it must be maintained in full force and effect. It cannot be so maintained if the appellate jurisdiction of the Supreme Court over such writs is taken away. The power given Congress to make exceptions does not extend to the destruction or infringement of any of the mandatory requirements of the Constitution.

Such a ruling would be warranted regardless of the construction placed upon the exceptions clause—regardless of whether it be construed as a general power or as limited to review of questions of fact. The same principle applies with equal or even greater finality to other libertarian doctrines upon which Congress and the states are forbidden to infringe even during crises of rebellion or invasion. To realize the engulfing nature of the broad construction of the exceptions clause, consider what would result if, in some new "McCarthy Era," all of its disciples in Senate and House were to unite in a composite of their diverse and common objectives. The resulting bill logically could enact that the Supreme Court shall have no jurisdiction to review any case growing out of the first, fourth, fifth, sixth, or fourteenth amendments. So viewed, the power claimed by and for Congress is crushed by its own magnitude.

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[115] Roane was a judge on the Virginia Court of Appeals that defied the Supreme Court's judgment in Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). That defiance produced Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). Roane was a voluble champion of states' rights and a political enemy of Chief Justice John Marshall. He attacked Marshall in a series of pseudonymous newspaper articles. *See* I. BRANT, JAMES MADISON, COMMANDER IN CHIEF 432-34 (1961); Note, *Judge Spencer Roane of Virginia: Champion of States' Rights—Foe of John Marshall*, 66 HARV. L. REV. 1242 (1953).

[116] Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73. See note 46 *supra.*

[117] Madison, Letter to Joseph Cabell, Sept. 16, 1831, in I. BRANT, *supra* note 115, at 487.

## IV

## CONGRESS VS. THE BILL OF RIGHTS

Beginning in 1957, a spate of bills to take away appellate jurisdiction has surfaced in Congress.[118] In that year Senator William E. Jenner of Indiana begat a quadri-headed monster.[119] His bill forbade the Supreme Court to review the following classes of cases: those drawing into question any action of any congressional committee or any action taken by Congress against a witness charged with contempt of Congress, any action by a government agency for the removal of security risks from government employment, any state laws or regulations to combat subversive activities, and any school board rule concerning subversive activities of teachers. Such a law would ratify the worst excesses of the "McCarthy Era."[120]

In his speech introducing the measure, Senator Jenner quoted the exceptions clause and said that as he read the words, Congress had "full, unchallengeable power to pass laws immediately which would deprive the Supreme Court of appellate jurisdiction, both as to law and fact," in the areas he cited.[121] As required by the rules, the bill was referred to the Committee on the Judiciary, chaired by Senator James Eastland of Mississippi, known for his extreme positions against civil rights and liberties and violent criticisms of the Supreme Court.[122]

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[118] S. 2646, 85th Cong., 1st Sess. (1957); S. 3386, 85th Cong., 2d Sess. (1958); H.R. 11926, 88th Cong., 2d Sess. (1964); S. 3069, 88th Cong., 2d Sess. (1964); Title II of S. 917, 90th Cong., 2d Sess. (1968), as amended, in S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). See also note 4 *supra*.

[119] S. 2646, 85th Cong., 1st Sess. (1957).

[120] Jenner's bill, S. 2646, as amended, included provisions of Maryland Senator John Butler's bill, S. 3386, 85th Cong., 2d Sess. (1958), to forbid Supreme Court review of state standards for admission to the practice of law.

[121] N.Y. Times, July 27, 1957, at 35, col. 4.

[122] Eastland provided for members of that committee a "study" entitled "The Supreme Court as an Instrument of Global Conquest," *Hearing on S. 2646 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary,*

Eastland steered the bill to his own Subcommittee on Internal Security, thereby depriving the Subcommittee on Constitutional Rights of jurisdiction over it. Senator Tom Hennings of Missouri, chairman of the latter subcommittee, intervened by polling a hundred deans of law schools. Only four could be found who favored the bill.[123] The Judiciary Committee reported the bill favorably to the Senate on May 15, 1958.[124] Senator Jenner clung to his bill, but it remained only an unrealized menace. Being passed over four times, it never came to a vote.[125]

In 1964, after *Reynolds v. Sims*[126] made fair apportionment mandatory in elections to state legislatures, the House passed a bill to strip federal courts, high and low, of either original or appellate jurisdiction in that field.[127] The Senate let the patent violation of article III die through inaction.[128]

However, when the Supreme Court undertook in *Miranda v. Arizona*,[129] *Escobedo v. Illinois*,[130] and *United States v. Wade*[131] to clothe criminal defendants with the guarantees of due process, the House excursion into lawlessness produced results in the Senate. Eastland's Committee on the Judiciary favorably reported two sections of the Omnibus Crime Control and Safe Streets Act of 1968, introduced by Senator Sam Ervin of North Carolina, restricting the power of the

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85th Cong., 2d Sess., pt. 2, app. IV 1073 (1958), of which the following is representative:

"Question. Do recent decisions of the Supreme Court follow preestablished Communist lines and contentions?

"Answer. Affirmative.

"More than 10 years ago Alger Hiss . . . and other identified Communist and pro-Communist pressure technicians of the Communist global conquest in American area VII filed briefs with the Supreme Court as amici curiae in *Shelley* v. *Kraemer* [334 U.S. 1 (1948)] [.]

"The Court's decision . . . followed their views." *Id.* at 1080.

[123] Washington Post, Mar. 10, 1958, at A9, col. 4.

[124] S. Rep. No. 1586, 85th Cong., 2d Sess. (1958); 104 CONG. REC. 8793 (1958).

[125] 104 CONG. REC. 9171, 17,536, 18,077, 19,536 (1958).

[126] 377 U.S. 533 (1964).

[127] H.R. 11926, 88th Cong., 2d Sess. (1964). *See* 110 CONG. REC. 20,300-01 (1964).

[128] The bill was placed on the Senate calendar on Aug. 31, 1964, and thereafter was ignored. 110 CONG. REC. 21,070-71 (1964).

". . . Although none of the [multitude of House] proposals [regarding reapportionment] sought directly to overrule the Supreme Court's congressional districting decision [Wesberry v. Sanders, 376 U.S. 1 (1964)], which required that congressional districts be 'as nearly equal as is practicable' in population, there is no doubt that those who saw their own seats threatened by that decision were glad to strike out, however wildly, at the cognate state legislative reapportionment decisions." McKay, *supra* note 5, at 269. The Senate, malapportioned by the Constitution and unaffected by the *Wesberry* decision, nevertheless was stirred to activity by Illinois Senator Everett Dirksen's similar S. 3069, 88th Cong., 2d Sess. (1964). His effort bore no fruit. *See generally id.*

[129] 384 U.S. 436 (1966).

[130] 378 U.S. 478 (1964).

[131] 388 U.S. 218 (1967).

Supreme Court *or inferior* federal courts to review state criminal proceedings.[132] A third provision prohibited similar review of certain federal trial court rulings.[133] How could Committee Chairman Eastland have hoped to escape Supreme Court condemnation of this denial of district and circuit court jurisdiction, in the face of the constitutional mandate that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . ."? Simple enough, if he had the votes. Just take away the Supreme Court's appellate jurisdiction over that clause too. The Eastland bill failed in spite of powerful support,[134] but the menace remains.

## CONCLUSION

Any attempt to throttle the Supreme Court is the accidental result of misplacing a comma when the amending words "both as to Law and

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[132] Title II of S. 917, 90th Cong., 2d Sess. (1968), as amended, in S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). Title II contained an amendment to 18 U.S.C. to add section 3502, which was to provide: "Neither the Supreme Court nor any inferior court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to review, or to reverse, vacate, modify, or disturb in any way, a ruling of any trial court of any State in any criminal prosecution admitting in evidence as voluntarily made an admission or confession of an accused if such ruling has [been] affirmed or otherwise upheld by the highest court of the State having appellate jurisdiction of the cause."

Title II also was to add to 28 U.S.C. the following, section 2256: "The judgment of a court of a State upon a plea or verdict of guilty in a criminal action shall be conclusive with respect to all questions of law or fact which were determined, or which could have been determined, in that action until such judgment is reversed, vacated, or modified by a court having jurisdiction to review by appeal or certiorari such judgment; and neither the Supreme Court nor any inferior court ordained and established under article III of the Constitution of the United States shall have jurisdiction to reverse, vacate, or modify any such judgment of a State court except upon appeal from, or writ of certiorari granted to review, a determination made with respect to such judgment upon review thereof by the highest court of that State having jurisdiction to review such judgment."

[133] Title II also proposed to add to 18 U.S.C. the following, section 3503: "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible into evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States; and neither the Supreme Court nor any inferior appellate court ordained and established by the Congress under article III of the Constitution of the United States shall have jurisdiction to review, reverse, vacate, modify, or disturb in any way, a ruling of such a trial court or any trial court in any State, territory, district, commonwealth, or other possession of the United States admitting in evidence in any criminal prosecution the testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is tried."

[134] *See* 114 CONG. REC. 14,175-84 (1968). Senator Ervin was an outspoken champion of his provisions, at one point declaring that the *Wade* decision, which section 3503 was an attempt to overrule, was "contrary to both the commonsense and the word of the Constitution." *Id.* at 14,180. Sections 2256, 3502, and 3503 were defeated after heated debate on May 21, 1968. 114 CONG. REC. 14,177, 14,181, 14,183-84 (1968). On May 23, 1968, the Senate passed H.R. 5037, 90th Cong., 2d Sess. (1968), in lieu of S. 917. *Id.* at 14,798.

Fact" were placed in the Constitution, thus producing ambiguity. The entire debate in the 1787 Convention, Alexander Hamilton's explanation in *The Federalist*, James Wilson's repeated explications, George Mason's proposed revision, and Joseph Story's penetrating analysis all point to one conclusion: Congress merely was given discretionary power to forbid the Supreme Court to retry facts in law cases.

To limit the scope of the exceptions clause, however, it is not necessary to rely on that historical record. A general power to make exceptions from appellate jurisdiction is condemned by its conflict with the whole constitutional edifice, and particularly with the defined functions and basic authority of the judiciary as set forth by the Constitution. The mind is staggered by the thought of what would result if Congress should pass, and the Supreme Court should bow to, a law prohibiting the review of state court decisions, or cases involving the first or fourteenth amendments.

Yet all of these and many other protections of liberty have been the targets of powerful congressional minorities, and even a majority in one instance, all based on a misinterpreted clause of the Constitution. This claimed power has become a dagger sharpened by social conflict and pointed at the heart of the Bill of Rights. Time and again Congress has raised this dagger. Only once has it descended, but the menace continues to mount. If Congress ever again exercises this never-granted destructive power, the Supreme Court, supported by public understanding, can check it. The testing case well might bear the title: ***The Congress and the Exceptions Clause v. The Constitution and People of the United States.***

# A CRITICAL GUIDE TO EX PARTE McCARDLE

William W. Van Alstyne*

It is commonplace that the Constitution of the United States restricts democratic government,[1] and that it does so as determined by the Supreme Court pursuant to its power of substantive constitutional review.[2] Although this power of the Court is nowhere explicitly granted in the Constitution[3] and often has been questioned in theoretical discussions,[4] most of us are reconciled to it and even are occasionally grateful that it exists. We doubtless agree that certain limitations should be respected by democratic majorities, whatever our differences as to what they should be.[5] Where those limits have been set, subject to change only by extraordinary processes of amendment, provision for an independent judiciary with the power of constitutional review has generally been accepted in this country as both wise and prudent. Among its other virtues, an independent judiciary may sometimes furnish an important alternative to the anguish of civil disobedience and the desperation of violence in the adjudication of fundamental rights.

Unquestionably, there have been occasions when opinions of constitutional interpretation by the Supreme Court have been extremely unpopular, doubtless even wrong and unjust. Even with respect to decisions widely believed to be of this nature, however, the general immunity of the Court from expedient means of swift and easy correction has seemed important to preserve. Hence with rare exception,[6] we have relied upon new appointments to the Court as the principal means of assuring its continuing identification with the felt necessities of the times.[7] The dependency of the Court upon the President and Congress to make its constitutional interpretations effective beyond a given case has been more commonly exploited, but seldom has it been effective in causing the Court to reverse a decision at a later date. Nor was the impeachment power[8] ever intended to be employed to subject judges to trial for the "high crime" or "misdemeanor" of disagreeing with Congress as to the constitutionality of its acts. In short, only the processes of amendment in article V of the Constitution clearly provide the means by which constitutional interpretations by the Supreme Court may be specifically overruled.

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[1] *But see* E. ROSTOW, THE SOVEREIGN PREROGATIVE 83-192 (1962).

[2] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[3] *See, e.g.*, L. HAND, THE BILL OF RIGHTS 3-30 (1958).

[4] For a selected bibliography, see Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 45-47.

[5] For a fascinating treatment of this age-old problem, see J. RAWLS, A THEORY OF JUSTICE (1971).

[6] There have been only three amendments to the Constitution adopted in response to specific decisions of the Supreme Court. U.S. CONST. amend. XI, *superceding* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); U.S. CONST. amend. XIII,

Within the past two decades, however, members of Congress have taken repeated recourse in another approach to controlling the Court and blunting its power of constitutional review: the congressional power to make exceptions to the appellate jurisdiction of the Supreme Court. In the late 1950's Congress considered a proposal to remove certain internal security laws from the possibility of Supreme Court invalidation.[9] Somewhat later, it proposed the immunization of existing legislative apportionment arrangements from effective constitutional challenge.[10] About the same time, another resolution attempted to foreclose judicial review of anti-obscenity laws on the one hand,[11] and religious school exercises on the other.[12] Finally, Congress has had before it bills designed to avert review of certain police techniques of criminal investigation[13] and the perpetuation of racial segregation in the public schools.[14]

To be sure, these bills would not have directly "overruled" the Supreme Court or "amended" the Constitution, and no startling dis-

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*superceding* Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); U.S. Const. amend. XVI, *superceding* Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895).

[7] Since article III establishes no set number, Congress may provide for the appointment of additional justices at any time, but the idea of political proliferation seldom has been regarded as appropriate. With rare exception, enlargement of the Court has merely kept pace with the growth of the country and the establishment of additional circuits. For an exhaustive statistical analysis of this development, see Blaustein & Mersky, *The Statistics on the Supreme Court*, in IV The Justices of the United States Supreme Court 1789-1969, at 3187-3239 (L. Friedman & F. Israel ed. 1969).

[8] U.S. Const. art. II, § 4 provides: "[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

[9] S. 2646, 85th Cong., 1st Sess. (1957).

[10] H.R. 11926, 88th Cong., 2d Sess. (1964).

[11] S. 4058, 90th Cong., 2d Sess. (1968).

[12] H.R. 6501, 92d Cong., 1st Sess. (1971).

[13] S. 1194, 90th Cong., 1st Sess. (1967).

[14] H.R. 13916, 92d Cong., 2d Sess. (1972) (busing moratorium bill); H.R. 10614, 92d Cong., 2d Sess. (1972). *See also* H.R. 1228, 85th Cong., 1st Sess. (1957).

covery of such a power in Congress has been claimed. Still, it is obvious that the objective was the same. Specifically, these bills sought to deaden the effect of particular Supreme Court decisions and to forestall their possible extension or additional application by enacting certain "exceptions" to the appellate jurisdiction of the Supreme Court: to stop the Court by an enforced silence.

The constitutional source for this power is thought to lie in the exceptions clause of article III, which prescribes the Court's appellate jurisdiction in the following language: "In all the other cases before mentioned [save those few committed to its original jurisdiction], the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*"[15] As none of the recent attempts to draw upon this clause has yet succeeded, it is unsurprising that the exceptions clause is not well known. It has received substantial attention in professional books and journals,[16] however, and as recently as 1968 it was the subject of unhurried discussion in the Hearings before the Senate Subcommittee on Separation of Powers.[17]

The views which have been expressed on the scope and meaning of the exceptions clause are by no means unanimous.[18] On the other hand, virtually everything written about this clause has shared in common at least one important reference other than to the bare language of the clause itself: a reference to *Ex parte McCardle.*[19] Though more than a century old, *McCardle* still stands as the leading case regarding the extent to which Congress may use the exceptions clause to oust the Court of its appellate power even as to the substantive constitutionality of acts of Congress. While McCardle's petition for habeas corpus was being reviewed on appeal in the Supreme Court, Congress adopted an amendatory act clearly intended to remove the Court's jurisdiction to prevent it from examining the constitutionality of the controversial Military Reconstruction Act. The Court unanimously sustained the Repealer Act and at once dismissed the case "for want of jurisdiction."[20] If *Marbury v. Madison*[21] is justly famous because it appeared to settle the primacy of the Supreme Court in interpreting the Constitution and resolving all cases within the judicial power of the United States, *Ex parte McCardle* is equally important because it appeared to settle the authority of Congress to make exceptions to the Supreme Court's appellate jurisdiction.

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[15] U.S. Const. art. III, § 2 (emphasis added).

[16] *See, e.g.*, R. Berger, Congress v. the Supreme Court (1969); I W. Crosskey, Politics and the Constitution 616-19 (1953); C. Fairman, Reconstruction and Reunion 1864-88, Part One, in VI History of the Supreme Court of the United States 413-601 (P. Freund ed. 1971); J. Goebel, Antecedents and Beginnings to 1801, in I History of the Supreme Court of the United States 204-50, 282-83, 299-300, 313-19, 330-33, 383-86, 431-49, 729 (P. Freund ed. 1971); H. Hart & H. Wechsler, The Federal Courts and the Federal System 288-340 (1953); III J. Story, Commentaries on the Constitution of the United States 449-56, 648-50 (1833); Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. Va. L. Rev. 238 (1970); Grinnell, *Proposed Amendments to the Constitution: A Reply to Former Justice Roberts*, 35 A.B.A.J. 648 (1949); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953); Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 U. Kan. L. Rev. 16 (1956); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960); Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949); Strong, *Rx for a Nagging Constitutional Headache*, 8 San Diego L. Rev. 246 (1971); Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 Boston U.L. Rev. 1 (1951); Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001 (1965); Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?*, 1969 Duke L.J. 291; Comment, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. Intra. L. Rev. 178 (1967); Note, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. Pitt. L. Rev. 99 (1958). For articles significantly related to this subject, see Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 Harv. L. Rev. 1532 (1972); Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).

[17] *Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968).

[18] For a sample of differences, see the various interpretations cited note 95 *infra*.

In addition to its constitutional significance, *McCardle* also provides an extraordinary insight into one of the many political crises of the First Reconstruction.[22] The first part of this article attempts to provide a glimpse of that era as background to the decision and as an aid to understanding the full intention of Congress in adopting the Repealer Act of 1868[23] which was construed and applied in *McCardle.* The second part provides a critical review of the Supreme Court's opinion, concluding with the disconcerting suggestion that the Court may have erred in associating the Repealer Act with the power of Congress to make exception to the appellate jurisdiction of the Supreme Court: whatever exceptions may have existed to that jurisdiction as originally conferred directly by article III, they arose not from enactment of the Repealer Act but from other sources not then in controversy before the Court. Indeed, there was no exception then applicable to bar the Court from deciding McCardle's constitutional claims. Rather than drawing upon this observation subsequently to argue that *McCardle* is of very little importance as a matter of technical legalism, however, part three attempts to show how the general position of the *McCardle* Court conforms entirely with virtually every other judicial construction previously and subsequently associated with the exceptions clause, how the view that the clause vests a plenary authority in Congress best fits the presuppositions of federalism generally animating the original plan of the Constitution and the original Judiciary Act of 1789, and how that view is nonetheless compatible with the integrity of the judicial power and the continuing protection of civil liberties by state and national courts.

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[19] 74 U.S. (7 Wall.) 506 (1869).

[20] *Id.* at 515.

[21] 5 U.S. (1 Cranch) 137 (1803).

[22] Charles Fairman reviews much more of that crisis in his recent excellent book than one can find room to remember in a critical guide to a single case. C. FAIRMAN, *supra* note 16, at 413-601. See also Kutler, *Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered,* 72 AM. HIS. REV. 835 (1967).

[23] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

## Historical Background and Decision

The immediate origins of *Ex parte McCardle* are bound up in the Reconstruction revisions of federal habeas corpus and necessarily require a brief review of that famous writ in terms of its availability in 1867. The writ in its most important form—*habeas corpus ad subjiciendum*—is directed to the person having custody of the petitioner, to produce him in court and to answer to allegations that the custody in which he is held is without legal justification.[24] So very important was it seen to be in the protection of personal liberty that its general availability in England had been memorialized by Parliament in the Habeas Corpus Act of 1679,[25] subsequently referred to by Blackstone in his first American edition of his *Commentaries* as "another Magna Carta."[26] In 1787, even before consideration and ratification of the Bill of Rights, the privilege of habeas corpus was written into article I, section 9, of the Constitution.[27] Nevertheless, as late as 1867, federal statutes provided for writs of habeas corpus in courts of the United States in only three sets of circumstances, and Congress otherwise relied upon state courts to make such writs available in other circumstances.[28]

The earliest federal provision for habeas corpus was made in section 14 of the original Judiciary Act of 1789 which permitted the federal courts, including the Supreme Court, to issue the writ only on behalf of prisoners held "in custody, under or by colour of the authority of the United States . . . ."[29] Thus, persons held in jail or otherwise detained by *state* or *local* authority could not secure a speedy determination of the legality of their detention through *federal* court petition.[30] In 1833, Congress approved habeas access to federal courts for persons confined under the authority of a state, but only insofar as such persons were detained "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof . . . ."[31] Except for an additional, modest extension of federal habeas in 1842,[32] to protect foreign citizens acting under a claim of national authority or international law, the doors of the federal courts remained closed to state prisoners.

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[24] *See* R. SOKOL, FEDERAL HABEAS CORPUS 35-37 (2d rev. ed. 1969).

[25] 31 Car. II, c.22.

[26] BLACKSTONE'S COMMENTARIES *135 (Am. ed. 1832).

[27] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

[28] *See* Oaks, *The "Original" Writ of Habeas Corpus In The Supreme Court*, 1962 SUP. CT. REV. 153. For changes in the statute from 1789 to 1867, see Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 131 F.R.D. 407 (1953).

[29] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.

The severe disadvantage of this arrangement was most acutely felt in the aftermath of the Civil War. State prisoners were unable to obtain federal habeas corpus relief even when held in violation of the Constitution or federal laws such as the newly ratified thirteenth amendment or the Reconstruction statutes providing for equal civil rights.[33] Finally, on February 5, 1867, the Reconstruction Congress expressly confirmed the power of all federal courts and judges to issue writs of habeas corpus in any case, state as well as federal, where custody was challenged on grounds of national law. Specifically, the new Act provided that the federal courts had "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."[34]

Senator Lyman Trumbull of Illinois, a Radical Republican who drafted this Act as well as several other major pieces of Reconstruction legislation, subsequently explained the necessity and purposes of the Act in these statements to the Senate:

> The act of 1789 authorized the issuing of all such writs in cases where persons were deprived of their liberty under authority or color of authority of the United States. Why, then, was the Act of 1867 passed? It was passed to authorize writs of *habeas corpus* to issue in cases where persons were deprived of their liberty under State laws or pretended State laws. It was the object of the act of 1867 to confer jurisdiction on the United States courts in cases not before provided for, and it was to meet a class of cases which was arising in the rebel States, where, under pretense of certain

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[30] For a brief period in 1801, however, habeas corpus was made more widely available. See the Judiciary Act of 1801, ch. 4, § 2, 2 Stat. 89, *as amended*, Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

[31] Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634.

[32] Act of August 29, 1842, ch. 257, 5 Stat. 539.

[33] Most of these statutes have been carried forward to the present. See 42 U.S.C. §§ 1981 *et seq.* (1970) (corresponds to Act of May 31, 1870, ch. 114, § 6, 16 Stat. 144); 18 U.S.C. §§ 241 *et seq.* (1970) (corresponds to Act of May 31, 1870, ch. 114, § 6, 16 Stat. 141).

[34] Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385.

> State laws, men made free by the Constitution of the United States were virtually being enslaved, and it was also applicable to cases in the State of Maryland where, under an apprentice law, freedmen were being subjected to a species of bondage. The object was to authorize a *habeas corpus* in those cases to issue from the United States courts, and to be taken by appeal to the Supreme Court.[35]

Thus for the first time, general federal court power to issue writs of habeas corpus in behalf of persons held in custody under state or local authority was firmly established in the federal judiciary, with express right of appeal to the Supreme Court.

Senator Trumbull's reference to that portion of the Act of 1867 authorizing a right of appeal to the Supreme Court pertained specifically to the second paragraph of section 1:

> From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States . . . .[36]

This provision of the Act was thought to be necessary because of a shortcoming which had developed as the result of judicial interpretation of section 22 of the Judiciary Act of 1789. Section 22 authorized review by the Supreme Court by writ of error from the judgments of inferior federal courts in all civil actions and suits in equity only when the matter in dispute exceeded the sum of $2,000.[37] In 1847, in *Barry v. Mercein*,[38] a denial of habeas corpus relief was brought to the Court by writ of error. The Court held that while petitions for habeas corpus were a form of civil action, no appeal could lie under section 22 from the judgment of an inferior federal court disposing of a habeas application unless the jurisdictional amount was satisfied.[39] The Act of 1867 overcame this obstacle by providing a right of direct appeal to the Court which was no longer dependent on satisfying the jurisdictional amount.

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[35] CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868).

[36] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

[37] Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 84.

[38] 46 U.S. (5 How.) 103 (1847). *Barry* involved a habeas corpus suit in a federal circuit court brought by a husband to secure custody of a child from the wife. The petition was disallowed by that court and the appeal was dismissed by the Supreme Court for lack of jurisdiction under section 22. It should be noted that *Barry* was not dispositive of the question whether a federal habeas petitioner could seek Supreme Court review when he was held in federal custody claimed to be unlawful under national law; petitioner's daughter was not held in federal custody, and lower court jurisdiction had been based solely on diversity of citizenship.

[39] Even prior to 1867, however, appeals could be taken from state court judgments in habeas claims raising federal questions, without regard to any dollar amount in controversy, under the same sections of the Judiciary Act of 1789 as those involved in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). See Ratner, *supra* note 16, at 193-201.

This statutory enlargement of federal habeas corpus relief was not, however, the only important legislation adopted by the Reconstruction Congress. In addition to enacting the thirteenth, fourteenth and fifteenth amendments, it adopted far-reaching substantive statutes to secure the federal protection of civil rights and civil liberties. Partially to enforce those measures, Congress also adopted the Military Reconstruction Act of March 2, 1867, to "regularize" federal military jurisdiction in the South by dividing the region into districts subject to military command.[40] Ironically, it was the clash between the Military Reconstruction Act and the Habeas Corpus Act of 1867 that was to produce the crisis of *Ex parte McCardle*.

The immediate events leading to the *McCardle* decision commenced on November 12, 1867, when the federal circuit court for the district of Mississippi issued a writ of habeas corpus directing Major General Ord, the Commander of the Fourth Military District, to deliver William H. McCardle to the United States Marshal, pending disposition on the merits of McCardle's claim that he was being held in military custody in violation of the Constitution.[41] McCardle, editor of the *Vicksburg Times*, had been arrested by Major General Alvin Gillem acting pursuant to the Military Reconstruction Act. At the time of his petition, McCardle was held in military custody awaiting trial by military commission for four alleged offenses, none of which appeared to be military in nature. He was charged with disturbing the peace, inciting to insurrection and disorder, libel, and impeding reconstruction, solely on the basis of several vituperative, anti-reconstructionist editorials he had authored and published in the *Times*.[42]

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[40] Act of March 2, 1867, ch. 153, 14 Stat. 428.

[41] Ex parte McCardle, 73 U.S. (6 Wall.) 318, 320-21 (1868), setting forth the pertinent facts.

[42] On November 6, 1867, McCardle had editorialized in the *Times*:

> We said a few days since that to be a military satrap, in the poor downtrodden South, was, ex necessitate rei, to be a scoundrel . . . there is not a single shade of difference between Schofield, Sickles, Sheridan, Pope, and Ord and . . . they are each and all infamous, cowardly, and abandoned villains who, instead of wearing shoulder straps and ruling millions of people, should have their heads shaved, their ears cropped, their foreheads branded, and their persons lodged in a penitentiary.

Additionally, McCardle urged whites to boycott an election called to authorize a state constitutional convention, offered to pay one dollar for the name of any white known to have voted and promised to publish the names in the *Times*.

A sample of a later editorial appears in the *Congressional Globe* of 1868, written by McCardle while he was free on bail and awaiting the outcome of his appeal to the Supreme Court. The editorial is dated January 21, 1868:

> There is not a man who will pay any tax imposed by this convention [the Mississippi state constitutional convention then in session], and if their tax collectors undertake to enforce collection, by seizing and selling the

On November 25, 1867, the federal circuit court denied McCardle's application for habeas corpus, but ordered him released on a $1,000 bond pending the outcome of his appeal to the Supreme Court pursuant to the appeals section of the Habeas Corpus Act of 1867. Immediately after his appeal had been docketed in the Supreme Court, however, a motion to dismiss for want of jurisdiction was filed on three grounds by counsel for the government[43] (including Senator Trumbull).

First, the government argued that since McCardle was held in custody under federal rather than state authority, the circuit court's jurisdiction must have been based upon the Judiciary Act of 1789 rather than upon the Act of 1867. Although conceding that the circuit court's jurisdiction under the Act of 1789 was proper, the government contended (presumably under *Barry v. Mercein*) that no appeal could be taken to the Supreme Court under that Act. Nor could an *appeal* be taken on the basis of the 1867 Act. While it was true that the language of the 1867 Act extended habeas jurisdiction to "all cases" where custody was attacked on a constitutional basis and authorized an appeal to the Supreme Court from any final decision by the circuit court, the government urged that in order to avoid redundancy insofar as federal prisoners were concerned and to maintain the limited reconstruction purpose of the 1867 Act, it ought to be construed to apply only to persons in state custody. The Supreme Court unanimously rejected this argument, however, noting that the Act of 1867 was

> of the most comprehensive character. It brings within the *Habeas Corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.
>
> *And it is to this jurisdiction that the system of appeal is applied.*[44]

The government's second, more technical argument asserted that appeals under the 1867 Act could be taken to the Supreme Court from circuit court judgments only when the circuit court had considered a habeas case on appeal from a district court, rather than as an exercise of the circuit court's original jurisdiction. This position was also rejected unanimously by the Court. Finally, the government sought to

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> property of the people, they will be shot down like dogs, as they are! . . . They know that Ord's convention has no power or authority to tax them, and they are determined not to be robbed! The men who attempt it will certainly get hurt, for they will be treated as all robbers and highwaymen deserve to be treated.

CONG. GLOBE 40th Cong., 2d Sess. 2061 (1868).

[43] *See* Ex parte McCardle, 73 U.S. (6 Wall.) 318, 320-21 (1868).

[44] *Id.* at 325-26 (1868) (emphasis added).

distinguish the case as one involving a person "charged with [a] military offense" which section 2 of the 1867 Act explicitly excepted from the section 1 right of appeal. In response, the Supreme Court simply observed that it would review that issue once the merits of the circuit court's decision were under consideration, although it clearly appeared that the argument was bound to fail since McCardle was not charged with any offense that could reasonably be called "military" in nature. Accordingly, on February 17, 1868, the government's motion to dismiss was denied.

As a result of the Supreme Court's unanimous decision upholding its jurisdiction in *McCardle I*,[45] an important anomaly had developed under the Reconstruction Congress' powerful contribution to federal habeas corpus. The Military Reconstruction Act, intended principally to protect Blacks and loyal whites against harassment by southern state authority, but drafted in far more comprehensive terms, had become a federal sword in the hands of an unreconstructed Mississippi editor. Even "worse," the Habeas Corpus Act, intended by its sponsors to establish habeas appellate jurisdiction principally to enable the Supreme Court to review *state* laws impeding reconstruction and subordinating federal rights, was about to be used with the immediate prospect that a *federal* statute deemed vital to reconstruction might be held unconstitutional. This latter issue, after all, was precisely the issue already set for argument on the merits in the Supreme Court. McCardle contended that his trial by court martial would violate his fifth and sixth amendment rights under the Constitution; that exigent circumstances did not warrant the use of martial rule and suspension of the right to trial by jury; that application of the Reconstruction Act to his editorials would violate the first amendment; and finally, that so much of the Act of Congress of March 2, 1867, which placed ten states under military jurisdiction was itself unconstitutional![46] In sum, the irony of the situation in *McCardle* was that the Habeas Corpus Act, designed to effecuate reconstruction policies, was about to be used to attack the Military Reconstruction Act itself.[47]

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[45] Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1868). Hereafter referred to as *McCardle I*.

[46] In light of the fact that Civil War hostilities ended in 1865, and that the civil courts were functioning in conformity with the fifth and sixth amendments (albeit not necessarily with impartiality), there was considerable reason to suppose that the Supreme Court would have decided against the constitutionality of courts martial for civilians. See Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). Within 3 weeks of the final decision in *McCardle II*, Chief Justice Chase wrote to a friend: "I may say to you that had the merits of the McCardle case been decided the Court would doubtless have held that this imprisonment for trial before a military commission was illegal." C. FAIRMAN, *supra* note 16, at 494.

[47] *See* Kutler, *supra* note 22, at 842.

On March 9, 1868, 3 months after *McCardle I*, oral argument on the merits of the case was concluded in the Supreme Court with Senator Trumbull again participating for the government. Three days later, on March 12, a rider was introduced in the House of Representatives, and then it was inconspicuously tacked onto an uncontroversial tax appeals bill which had already passed the Senate. Without any special note being taken of the rider, the bill as amended was adopted virtually without debate. Late on the same day, the amended bill was passed by the Senate.[48] Section 2 provided:

> *And be it further enacted,* That so much of the act approved February [5, 1867], entitled "An act to amend 'An act to establish the judicial courts of the United States,' approved September [24, 1789]," as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed.[49]

This amendment was added, of course, to strike at McCardle's pending case. As stated by Representative James Wilson of Iowa when called upon to explain his objective in having introduced the Repealer Act, his amendment had been aimed at "striking at a branch of the jurisdiction of the Supreme Court of the United States . . . thereby sweeping the [McCardle] case from the docket by taking away the jurisdiction of the court . . . [to] prevent the threatened calamity falling upon the country."[50] The calamity which Wilson feared was, in his own words, "that the McCardle case was to be made use of to enable a majority of that Court to determine the invalidity and unconstitutionality of the reconstruction laws of Congress."[51]

Nonetheless, the effort did not succeed without resistance. On March 25, the Bill was returned to both Houses with a strongly worded veto message by President Johnson. The message is not without its own interest since Johnson's impeachment trial formally commenced only 5 days later, pursuant to articles of impeachment which had already been reported against him. Thus, as he penned his veto, Johnson was aware that he was about to be tried by the very body whose legislation he again had presumed to condemn. He stated in part:

> I cannot give my assent to a measure which proposes to deprive any person restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States, from the

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[48] C. FAIRMAN, *supra* note 16, at 465.
[49] Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.
[50] CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868).
[51] *Id.*

> right of appeal to the highest judicial authority known to our government. To secure the blessings of liberty to ourselves and our posterity is one of the declared objects of the Federal Constitution. To assure these guarantees are provided in the same instrument, as well against 'unreasonable searches and seizures' as against the suspension of the 'privilege of the writ of *habeas corpus,*' unless when, in cases of 'rebellion or invasion, the public safety may require it.' It was doubtless to afford the people the means of protecting and enforcing these inestimable privileges that the jurisdiction which this bill proposes to take away was conferred upon the Supreme Court of the nation. The act conferring that jurisdiction was approved on the 5th of February, 1867, with a full knowledge of the motives that prompted its passage, and because it was believed to be necessary and right. Nothing has since occurred to disprove the wisdom and justness of the measures; and to modify it as now proposed would be to lessen the protection of the citizen from the exercise of arbitrary power and to weaken the safeguards of life and liberty, which can never be made too secure against illegal encroachments.
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> . . . .
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> The legislation proposed in the second section, it seems to me, is not in harmony with the spirit and intention of the Constitution. It cannot fail to affect most injuriously the just equipoise of our system of government; for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation. Thus far during the existence of the Government the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into or mistaken for an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences.[52]

The veto was predictably overridden in the Senate on March 26 and in the House on March 27. The brief discussion in both Houses fully confirmed the President's specifications of the amendment's design: to deny to the Supreme Court authority to exercise its power of substantive constitutional review. The Repealer Act was intended to prevent the Court from determining whether McCardle was being held in military custody in violation of the Bill of Rights and to preclude the possibility that the Military Reconstruction Act of March 2, 1867, imposing martial rule, would be declared unconstitutional.[53] Immediately following its passage by the requisite majorities in both Houses, the Repealer Act was filed in the Supreme Court. A decision as to the effect of the Act on McCardle's then-pending case was postponed and the Court called for new arguments on the jurisdictional issue.

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[52] *Id.* at 2165.

The chronology of events thus associated with McCardle's claim on the merits in the United States Supreme Court was this:

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| February 5, 1867: | Act of Congress expands habeas jurisdiction of inferior federal courts with right of appeal to Supreme Court. |
| March 2, 1867: | Reconstruction Act of Congress establishes military districts, and provides for military jurisdiction in a 10-state |

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[53] *Id.* at 2062-2120, including the following remarks:

*Senator Doolittle.* [T]he honorable Senator from Illinois [Trumbull, who had just spoken and who had described the repealer bill as "of very little importance"] is altogether mistaken in the view which he now presents. . . . The honorable Senator himself, as counsel in that court, if I am correctly informed, with other counsel made a motion to dismiss a case pending in the Supreme Court, or alleged to be pending under this act, and the court refused to dismiss it. . . . We all know, the whole world knows, that this case of McCardle is pending in the Supreme Court, brought up on appeal, under the act of 1867, from the circuit court of Mississippi, and that that case has been argued by eminent counsel, and that it is pending.

*Senator Hendricks.* [T]he Senator from Nevada [Stewart] was compelled to admit that the court was not crowded; and when I asked him the question how many cases of this sort and under this law had come into that court he could name but one—the McCardle case. . . . Will senators be good enough to recollect of a single instance in the history of any free Government where, for proper purposes, the jurisdiction of an appellate court has been taken away from a cause after that jurisdiction had attached? . . .

But it is done here; and why? It is to reach the McCardle case. . . . [W]hy should he not be heard in that court? Had not the Supreme Court of the United States, with great unanimity, decided that a military commission could not try a citizen in a time of peace for an ordinary civil offense that the Constitution had guaranteed to that citizen a trial before a jury with full opportunity for defense? . . . . For what purpose has the Supreme Court of the United States been established? . . . . Does not the Constitution contemplate that all legislation shall undergo the test of the Supreme Court of the United States? Marshall thought so; Taney thought so. I cite the lights of the law. Marshall, probably the greatest jurist our country has produced, freely discussed all constitutional questions, and contributed more to establish the meaning and proper construction of the Constitution than any other man of the country. . . .

*Senator Johnson* (Maryland): Congress has been passing acts of legislation which were supposed to be questionable; the power to pass them doubted. The President of the United States sought to prevent them by messages containing an argument to demonstrate the want of authority to pass them. Congress passed the act of February 5, 1867, and under that act a case finds its way into the Supreme Court, was argued several days or a week or more prior to the 11th of March, 1868, and rumor had it that it was to be decided. The court had no authority to decide it except by virtue of that act; and the bill repealing it, without original explanation of its purpose, was passed by both Houses in two days. Will not the historian say that those who were engaged in such legislation either knew or apprehended that the highest court in the land would or might hold the laws to be unconstitutional?

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| | area, authorizing trial by military commission. |
| November 2, 1867: | United States circuit court issues writ to produce McCardle challenging military authority to arrest and to try him for state offenses without trial by jury. Validity of Military Reconstruction Act is also drawn into question. |
| November 25, 1867: | Circuit court denies McCardle's application for habeas relief, but orders him released on $1,000 bail pending outcome of appeal to Supreme Court. |
| February 17, 1868: | Motion to dismiss appeal in Supreme Court for want of jurisdiction is unanimously denied, and the case is set for consideration on the merits—*McCardle I.* |
| March 9, 1868: | Argument on the merits of McCardle's appeal is concluded in the Supreme Court. |
| March 12, 1868: | Act is adopted by both Houses to repeal that portion of 1867 Act under which McCardle's case had been heard in Supreme Court. |
| March 25, 1868: | President Johnson returns the Repealer Act to both Houses with message of veto. |
| March 27, 1868: | Veto is overridden in the Senate and House. |
| April 12, 1869: | Following delayed argument in Supreme Court on the effect of the Repealer Act on the Court's jurisdiction to decide McCardle's appeal on the merits, the Supreme Court announces its unanimous decision—*McCardle II.* |

The unanimous decision of the Court in *McCardle II*[54] on April 12, 1869, was virtually anticlimactic. Terse and dryly matter-of-fact, Chief Justice Chase's opinion for the Court contrasted greatly with the style Chief Justice John Marshall had employed in *Marbury v. Madison*,[55] which *Ex parte McCardle* is thought to affect so importantly. Where Marshall raised, and resolved by dicta, virtually every claim pressed by Marbury, Chase carefully avoided any equivalent discussion of the many claims raised by McCardle. Even the issue which has identified the historical significance of the case—the power of Congress over the appellate jurisdiction of the Supreme Court—was treated without rhetorical flourishes as a rather straightforward and perfectly well-settled proposition. Indeed, finding support for its position in another opinion by Marshall, the Chase Court recorded its *ratio decidendi* in the following few paragraphs:

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[54] 74 U.S. (7 Wall.) 506 (1869).

[55] 5 U.S. (1 Cranch) 137 (1803).

> It is quite true, . . . that the appellate jurisdiction of this court is not derived from Acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.'
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> . . . In the case of *Durousseau v. The United States* [6 Cranch, 312; Wiscart v. Dauchy, 3 Dallas, 321], particularly, the whole matter was carefully examined [by Chief Justice Marshall] and the court held, that while 'the appellate powers of this court are not given by the judicial act, but are given by the Constitution;' they are, nevertheless, 'limited and regulated by that act, and by such other acts as have been passed on the subject.' The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress 'of making exceptions to the appellate jurisdiction of the Supreme Court.' 'They have described affirmatively,' said the court, 'its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it.'
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> . . . .
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> The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.
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> We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function

> remaining to the court is that of announcing the fact and dismissing the cause. . . .
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> . . . .
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> It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisidiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.[56]

So the case came to an end. In its denouement, *Ex parte McCardle* had two character traits shared with *Marbury v. Madison*, apart from the additional coincidence that it derived its basic reasoning from an opinion by John Marshall. First, the immediate, substantive constitutional issues which generated great political interest in the case at the time were altogether avoided, even more completely than in *Marbury*. Second, whereas *Marbury* would be read to declare that "while we are under a Constitution, the Constitution is what the judges say it is,"[57] *Ex parte McCardle* appeared to lay down a very sobering afterthought: Congress may prevent the Supreme Court from saying anything at all, at least where its appellate jurisdiction is concerned.

## A CRITICAL REVIEW OF THE *McCardle* OPINION

Criticism of *Ex parte McCardle* has not been in short supply. At the level of judicial policy, it has been suggested that the Supreme Court either should have disregarded the 1868 Repealer Act altogether (having already determined its jurisdiction to proceed in *McCardle I*), or should have held the Act inapplicable to McCardle's case since it became effective only after argument had already been heard on the merits. Had the Court proceeded according to either of these alternatives, it would have avoided inflicting upon itself the fateful holding of its jurisdictional subordination to the will of Congress. Indeed, it would have avoided the necessity of confronting two difficult and highly charged issues of constitutional significance: whether applicability of the Repealer Act to a case already sub judice violated the constitutional imperative of separated powers;[58] and whether operation of the Act to frustrate national substantive constitutional review was not among the kinds of "exceptions" Congress is permitted to make to the appellate jurisdiction of the Supreme Court pursuant to article III. In keeping with well-supported canons of judicial construction, the avoidance of such highly sensitive issues as these might itself have provided an additional justification for the Court to limit the effect of the Repealer Act short of McCardle's case.

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[56] Ex parte McCardle, 74 U.S. (7 Wall.) 506, 512-15 (1869).

[57] Hughes, *Speech Before the Elmira Chamber of Commerce*, ADDRESSES AND PAPERS 133, 139 (1908).

[58] *Compare* the statement by Mr. Justice Harlan in Glidden Co. v. Zdanok, 370 U.S. 530, 567 (1962), that "Congress has consistently with [article III] withdrawn the jurisdiction of this Court to proceed with a case then *sub judice, Ex parte McCardle* . . . .", *with* Mr. Justice Douglas' view that "[t]here is a serious question whether the *McCardle* case could command a majority view today." *Id.* at 605, n.11 (dissenting opinion). From the context in which it was offered, Mr. Justice Douglas' *caveat* was possibly limited to the issue of removing jurisdiction over a case already sub judice. On the broader issue, he has said: "[a]s respects our appellate jurisdic-

Against this suggested recourse, however, is first of all the very emphatic language of the Repealer Act itself (". . . appeals *which have been*, or may hereafter be taken")[59] and a legislative record unmistakably attaching the Act specifically to McCardle's then-pending appeal. Second, there is the fact that the Court had neither reached a decision on the merits of the case, nor even considered the case in conference, as of the time the Repealer Act became law. In conference, on March 21, 1868, the Court decided to postpone consideration of *Ex parte McCardle*, notwithstanding opposition by Justices Grier and Field.[60] This decision almost certainly removed the substantiality of the issue that holding the Repealer Act applicable to the yet-undecided case would trespass upon the judicial power respecting the finality of judgments. Chief Justice Chase's subsequent perfunctory discussion of the sub judice issue in *McCardle II* appears to have been quite correct, given the fact that the case had not come to decision by the date the Act became effective. Similarly, had the Court moved quickly to decide the case (as it could have between March 9 when argument was concluded and March 27 when the Act became law), it would then have been thrown into confrontation with the very substantial questions presented by the merits: the unconstitutionality of the Military Reconstruction Act in light of *Ex parte Milligan*[61] and the first, fifth and sixth amendments. Thus, avoidance of highly sensitive federal questions was scarcely a compelling reason either to have hurried the decision or to have given the Act a willfully tortured construction in order to deny its intended application to McCardle's case.[62]

A more telling line of criticism, however, has suggested that even conceding the applicability of the Repealer Act to McCardle's appeal insofar as jurisdiction was based solely on the repealed portion of the 1867 Habeas Corpus Act, the Supreme Court could readily have con-

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tion, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III. See *Ex parte McCardle* . . . ." Flast v. Cohen, 392 U.S. 83, 109 (1968).

[59] Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44 (emphasis added).

[60] C. Fairman, *supra* note 16, at 467.

[61] 71 U.S. (4 Wall.) 2 (1866).

[62] *See also* Kutler, *supra* note 22.

sidered the case under another unrepealed source of appellate jurisdiction—as the Court itself perfectly well knew. Dismissal "for want of jurisdiction" was therefore an unworthy evasion of its constitutional obligation and insensitive to McCardle's personal predicament as a federal prisoner. Specifically, section 14 of the Judiciary Act of 1789 continued to provide that "all the before-mentioned courts of the United States [including the Supreme Court], shall have power to issue writs of . . . *habeas corpus*."[63] As early as 1795, moreover, the Supreme Court had permitted this section to be used by persons held "under or by colour of the authority of the United States," independent of section 22 of the same Act which generally confined an appeal in civil actions arising in the inferior federal courts to cases involving more than $2,000. Section 14 cases fell within the "appellate jurisdiction" of the Supreme Court because they called upon the Court to revise a judgment of an inferior tribunal;[64] but since they arose in the Supreme Court on petition for an original writ of habeas corpus, they did not involve the particular form of an "appeal" to which the limitations of section 22 applied.[65]

Had McCardle's counsel brought the case to the Supreme Court by this means, instead of (or merely in addition to) utilizing the broader provision of the newly-minted appeals section of the 1867 Act, presumably McCardle would have been entitled to a decision on the merits. In fact, less than 1 year later another unreconstructed Mississippi newspaper editor in identical circumstances of military custody[66] invoked this very means of access to the Supreme Court to raise many of the issues involved in *McCardle*. Without the least hesitation, the Supreme Court unanimously sustained its jurisdiction and proceeded to the merits.[67]

As strange as this alternative may seem in light of the congressional discussion which rather clearly assumed that jurisdiction in McCardle's case depended solely on the 1867 Act, it was apparent to the Justices even at the moment they dismissed McCardle's case for "want of jurisdiction." Their unanimous opinion in *McCardle I* just the year before reviewed this use of habeas corpus as a confirmed mode of appellate jurisdiction.[68] Furthermore, the final paragraph in *McCardle II* again adverted to this alternative procedure, more or less anticipating the holding in *Ex parte Yerger*:

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[63] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.

[64] Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807). *But see* Paschal, *supra* note 16.

[65] *See, e.g.*, *In re* Kaine, 55 U.S. (14 How.) 103 (1852); *Ex parte* Burford, 7 U.S. (3 Cranch) 447 (1806); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

[66] Except that the substantive charge was murder, rather than varieties of seditious libel.

[67] *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869). Once again, however, the case was mooted when the government arranged to transfer custody of Yerger to state civil authority.

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. *It does not affect the jurisdiction which was previously exercised.*[69]

Given this consideration, should not the Court have proceeded to reach the merits, acknowledging that the technical basis on which appeal had been perfected from the circuit court had been withdrawn by Congress, but declining to reject the case in view of the existing alternative basis for retaining jurisdiction as confirmed by section 14 of the Judiciary Act of 1789? In favor of this result it might be observed that the Supreme Court has generally not been overly technical in holding parties to the particular source of appellate jurisdiction they have invoked.[70] Surely it was understandable that McCardle's counsel had not thought to invoke the more obscure procedure when he first filed under the then-apposite provision of the 1867 Act. The Court could not suppose that there had been sufficient oversight by counsel to prejudice his client's standing. And while an "appeal" might ordinarily provide a wider scope of review than a habeas proceeding in the Supreme Court, that would not be true where, as here, the appeal was itself from a habeas proceeding. The claims which McCardle had raised were entirely questions of law which went directly to the jurisdiction of a military commission to try him on the stated charges. Thus, the case was well within the scope of section 14 of the Judiciary Act of 1789. Finally, John Marshall had presumably indicated what the Court should do in such circumstances when he observed nearly a half-century earlier: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[71]

Given these several considerations, perhaps the Court might have proceeded to reach a decision on the merits of the case despite the Repealer Act, and arguably it should have done so notwithstanding the possible reaction in Congress. Yet the reasonableness of that recourse, like the reasonableness of the position of Justices Grier and Field who had urged the Court to decide the case even before the Repealer Act became effective, scarcely demonstrates that the course the Court chose instead to pursue was unprincipled. As the Court knew, McCardle was in no personal jeopardy at the moment. Indeed, following his release on bail by the circuit court, he had again been writing flaming editorials for the *Vicksburg Times*. In addition, the Court was aware of other congressional action which had been taken in mistrust of the judiciary.[72] There was good reason, therefore, not to alienate Congress further. Self-interest quite aside, the Court was also aware of the congressional belief that a decision invalidating the Military Reconstruction Act would be a devastating blow to the capacity of the country to secure the protection of Blacks and loyalists in the South in the aftermath of bloody Civil War. Furthermore, since the effect of the 1867 Habeas Corpus Act and of the Repealer Act on section 14 of the Judiciary Act had not been specifically addressed in the several *McCardle* arguments, it is hardly surprising that the Court declined to reach out in what might have seemed to be a gratuitous fashion to hold onto the *McCardle* case. As it was, the final paragraph of the opinion suggested that only delay in decision was involved, and not self-abnegation of the power to decide.

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[68] 73 U.S. (6 Wall.) at 324.

[69] 74 U.S. (7 Wall.) at 515 (citation omitted, emphasis added).

[70] Even today, parties mistakenly taking an "appeal" are frequently treated as though they had petitioned for "certiorari." See 28 U.S.C. § 2103 (1970).

[71] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

There was, as a consequence, nothing clearly subject to censure in the decision of the Court not to proceed on the merits pursuant to the alternative source of appellate jurisdiction provided by section 14 of the Judiciary Act of 1789. Nor, as we have seen, was the Court necessarily wrong in granting full effect to the Repealer Act as applied to a case as yet undecided on the date when the Act became law. Were these the only features of the Court's reaction to the political and judicial circumstances of 1868, it is surely doubtful whether *Ex parte McCardle* would ever have come under intense criticism as a precedent in American constitutional law.

Rather, what has made *Ex parte McCardle* so much the sword of damocles is its *ratio decidendi* in respect to the basis and scope of congressional authority to adopt the Repealer Act and to "make exceptions" to the appellate jurisdiction of the Supreme Court. The truly significant part of the case seems to be tightly packed into the following few lines:

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[72] Congress had already reduced the Supreme Court from ten to seven members. Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209. *Compare* 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 144-45 (1923), *with* S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 59-60 (1968). In addition, a bill which had already cleared the House proposed to require an extraordinary majority vote of the Justices to invalidate an act of Congress. H.R. 379, 40th Cong., 2d Sess. (1868). *See* 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 188-93 (1923).

> The exception to appellate jurisdiction in the case before us . . . is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. . . . It is hardly possible to imagine a plainer instance of positive exception.
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> . . . .
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> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.[73]

As to this, however, possibly an important objection *can* be offered: not merely that the Repealer Act was not an exception "made in terms" or an instance of "positive exception," but that in fact it made *no* exception and possibly is not even correctly identified to the proper constitutional clause. The objection to be examined is intended to be different from several qualifying observations which have been made along similar lines in other treatments of *Ex parte McCardle*, however, and correspondingly to be more muted in its ultimate effect. At the same time, it may suggest an actual error was committed in the *McCardle* Court's formulation of its *ratio decidendi.*

It has elsewhere been pointed out that the *McCardle* decision, taken in context, did not in fact oust the Court from the power to perform any of its "essential" or "minimum" functions under *Marbury v. Madison, Fletcher v. Peck, Martin v. Hunter's Lessee,* or *Cohens v. Virginia*:[74] that is, to adjudicate the substantive constitutionality of Acts of Congress (or of the several states) in all cases or controversies where that question had been appropriately raised and pressed through whatever courts the litigants might first have had to pursue, and to establish a uniform construction for federal laws (including treaties) similarly drawn into controversy. It did not do so because, as anticipated by dicta in the case itself and as subsequently confirmed in the holding of *Ex parte Yerger*, there remained available an alternative recourse by means of which the substantive constitutionality of the controverted Act of Congress, the Military Reconstruction Act, could be brought within the Supreme Court's power of constitutional review. *McCardle*, in short, upheld only an inessential exception to the Supreme Court's jurisdiction, and did not curtail any of its important authority.[75]

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[73] 74 U.S. (7 Wall.) at 513-14.

[74] Respectively at 5 U.S. (1 Cranch) 137 (1803); 10 U.S. (6 Cranch) 87 (1810); 14 U.S. (1 Wheat.) 304 (1816); 19 U.S. (7 Wheat.) 264 (1821).

[75] *See, e.g.*, R. Berger, *supra* note 16; B. Schwartz, Constitutional Law 15-20 (1972); Forkosch, *supra* note 16; Ratner, *supra* note 16; Note, *supra* note 16.

But respectfully, even this technical revisionism of *McCardle* may concede too much in one respect and tends, in a different respect, to generate a number of very serious questions which would appear to be virtually intractable under the broad language of the "exceptions" clause. (For instance, what is to be the basis for declaring that some exceptions are legitimate because they are relatively unimportant, and how can one's preference be reconciled with the unqualified provision in article III? Why, especially if the point were felt to be important, did the *McCardle* Court itself make no mention of any such limiting principle and, indeed, why to the contrary did the Court speak as though there were no such distinction?) A different point may be offered, however, by suggesting that it was simply incorrect to say, as the Court did say in *McCardle*, that Congress, by repeal of the appeals section of the 1867 Act, thereby made at least some exception to the appellate jurisdiction of the Supreme Court, at least for some cases arising under at least one federal law. It did not do so because no case arising under the Habeas Corpus Act of 1867 (or any other Act) was, *by force of the Repealer Act of 1868*, placed beyond the appellate jurisdiction of the Supreme Court.

What was involved in *McCardle* was merely the congressional reconsideration and repeal of a special statutory right of access which had previously granted to a certain class of litigants a guaranteed "appeal" to the Supreme Court. Wholly unaffected by rescission of that statutory provision per se, however, was the judicial power conferred upon the Court by force of article III itself or as confirmed by several acts of Congress. Correspondingly, whatever diminution or "exception" might exist with respect to the Court's article III appellate jurisdiction, it would result only from the negative implications from *other* Acts of Congress as previously construed by the Court (as in *Barry v. Mercein*), and not by any provision of the Repealer Act itself. And as the Court declined to consider its jurisdiction under any statute save only that which had been withdrawn, it had no occasion whatever to discuss the character and scope of Congress' power to "make exceptions." *That* power was simply not involved in McCardle's case.

All that the Repealer Act did was to repeal "so much of the act approved February 5, 1867 . . . . as authorized an appeal."[76] Notwithstanding the design of Congress to have accomplished more than this, nothing more was done. That it did nothing more, and specifically that it made no "exception" from the appellate jurisdiction of the

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[76] Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

Supreme Court of cases arising under the Habeas Corpus Act of 1867, is conclusively evidenced by the unanimous holding in *Ex parte Yerger* 1 year later—a case which arose under the same Habeas Corpus Act of 1867 and which was unanimously held to come readily within the appellate jurisdiction of the Supreme Court subject only to limitations provided by sections 14 and 22 of the Judiciary Act of 1789: that appellate jurisdiction could not be exercised by entertaining an "appeal" in a civil case not involving more than $2,000, but that it could be exercised through issuance of an original writ of habeas corpus.[77]

Indeed, for the Repealer Act of 1868 to reflect a claim of congressional authority to make "exception" to the Supreme Court's article III appellate jurisdiction to review cases arising under the Habeas Corpus Act of 1867, it would have had to be framed in much different terms, such as:

> No case arising under the Habeas Corpus Act of 1867 shall be subject to the appellate jurisdiction of the Supreme Court.

Or:

> A final decision of a circuit court in cases arising under the Habeas Corpus Act of 1867 shall not be subject to review in any other court.

But, of course, it did neither of these and, in light of *Yerger*, it cannot be pretended to have done so even by implication. To be sure, the Repealer Act was not trivial legislation and it did effectively strip a certain class of parties of an important statutory right they formerly enjoyed under the Habeas Corpus Act of 1867: a statutory right to be heard on full and direct *appeal* from an adverse decision by a federal circuit court in respect to the lawfulness of custody in which they might be held by state or federal officials in alleged violation of the Constitution. Nevertheless, extinguishment of that procedural right left no gap in the appellate jurisdiction of the Supreme Court in the exercise of judicial power either regarding its power to entertain all such cases originally arising under the Habeas Corpus Act of 1867 or, indeed, regarding its power to determine any issue of law appropriately framed in such cases. All of this is implicit in the Court's saving reference in *McCardle* to the power of review preserved by section 14 of the Judiciary Act of 1789, and explicit in its very next holding, in *Ex parte Yerger*, that as the appeals section of the Habeas Corpus Act of 1867 was an addition to rather than a displacement of that section, its repeal left that section intact as a confirmation and regulation of the Court's appellate jurisdiction. Plainly, of course, the Repealer Act of 1868 had no effect at all on the appellate jurisdiction of the Supreme Court concerning any cases other than those arising under the Act of 1867, and thus, as it established no "exception" of these, it established no exception at all.

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[77] This point was well expressed in *Ex Parte* Yerger, 75 U.S. (8 Wall.) 85, 105 (1869):

> These words [of the Repealer Act] are not of doubtful interpretation . . . . They reach no Act except the Act of 1867.
>
> It has been suggested, however, that the Act of 1789, so far as it provided for the issuing of writs of habeas corpus by this court, was already repealed by the Act of 1867. We have already observed that there are no repealing words in the Act of 1867. If it repealed the Act of 1789, it did so by implication . . . .
>
> Repeals by implication are not favored . . . . [T]he provision of a new and more convenient mode of its exercise [of appellate jurisdiction] does not necessarily take away the old; and that this effect was not intended is indicated by the fact that the authority conferred by the new Act is expressly declared to be 'in addition' to the authority conferred by the former Acts. Addition is not substitution.

This held true, incidentally, even as applied to persons originally held in custody under state, rather than federal, authority who, having petitioned for a writ of habeas corpus in a federal circuit court as provided by the first section of the 1867 Act, were unsuccessful and who were then remanded to the custody of state officials. To be sure, until 1867 such persons could not get into federal courts, because section 14 of the Judiciary Act of 1789 was deemed to limit federal court power to issue writs of habeas corpus to those in custody "under the authority of the United States." But as the 1867 Act gave them access to the lower federal courts, the Supreme Court was to hold that the "custody" in which they would subsequently be held would necessarily be "under the authority of the United States" as defined by section 14 of the Judiciary Act of 1789 insofar as the immediate "authority" for that custody would necessarily be an order by a federal court, even if the "order" was merely one remanding them to state custody. The impression is confirmed again by dicta in *Yerger*:

> We are obliged to hold, therefore, that in *all* cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.[78]

Thus, repeal in 1868 of the appeals section of 1867 not only made no exception to the Supreme Court's appellate jurisdiction concerning cases arising under the unaffected portion of the 1867 Act dealing with persons originally held in federal custody (such as McCardle); it did not even establish an exception-by-implication with respect to persons originally held in state custody.

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[78] *Id.* at 103 (emphasis added).

At the very most, the operative effect of the Repealer Act of 1868 was solely to limit the *scope* of Supreme Court review in cases formerly entitled to be heard on direct and full appeal. By extinguishing the litigant's procedural right of "appeal," and by forcing him to fall back upon a petition for habeas corpus as the means to invoke the Supreme Court's appellate jurisdiction, the Repealer Act may have had the effect of foreclosing a re-examination of certain issues of fact which, as an original proposition, article III commits to the appellate jurisdiction of the Supreme Court subject, however, to exception by Congress: "In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, *both as to Law and Fact*, with such Exceptions, and under such Regulations as the Congress shall make."[79] Even as to this, strictly speaking the "exception" to the scope of review would arise *not* by force of the Repealer Act of 1868, but solely by implication from the Judiciary Act of 1789; insofar as *that* Act addressed itself affirmatively to the appellate jurisdiction of the Supreme Court, the scope of that jurisdiction was deemed to be affirmatively limited pursuant to the "exceptions" clause.[80] Moreover, where as in *McCardle* an "appeal" might previously have been taken under the appeals section of the 1867 Act, but the appeal was itself from a habeas proceeding, it is not at all clear that the scope of judicial review would have been in *any* respect broader than that already provided for under section 14 of the Judiciary Act of 1789.

The point to be made about *McCardle*, however, is not the more difficult one of determining the knitting and fitting together of *other* cases and *other* acts of Congress. It is, rather, the simpler point that the 1868 Act of Repeal neither was, nor purported on its face to be, an exercise of whatever power Congress may (or may not) possess to make "exceptions" to the Supreme Court's appellate jurisdiction. Indeed, the constitutional source of the power to repeal a portion of the 1867 Act creating a special right of "appeal" was presumably simply the same source of power previously involved in the enactment of the very provision to be repealed. Quite clearly that specification of statutory right was not based to any degree upon the "exceptions" clause (especially as the Court stated that the 1867 Act itself did not limit, even by implication, any means persons aided by its provisions could otherwise use to invoke the Court's appellate jurisdiction); correspondingly, neither did its repeal per se. Thus, while the Court committed no error in sustaining the constitutionality of the Repealer Act and in declining to proceed with McCardle's case under another confirmed statutory heading of its appellate jurisdiction, it may have been in error in its *ratio decidendi*: whatever its true or authentic meaning, the "exceptions" power of Congress may not have been involved in *Ex parte McCardle*.

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[79] U.S. CONST., art. III (emphasis added).
[80] *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810).

Measured criticism of *Ex parte McCardle* is thus to be found not in contending that the Supreme Court was necessarily in error in upholding the constitutionality of the Repealer Act as applied to a case sub judice, or in its decision to decline to proceed to a decision on the merits of the case involving the constitutionality of the Military Reconstruction Act. Rather, it is based on the unguarded suggestion by the Court that the case was dismissed for "want of jurisdiction" when, according to the Court's own observations, it had adequate jurisdiction to proceed but simply declined, under the circumstances, to proceed sua sponte on a different jurisdictional basis than that previously relied upon by a party in no immediate danger of irreparable harm. And it is based, too, on the criticism that the Court treated the Repealer Act as though the Act (which was the only statute immediately in controversy before the Court) itself established some "exception" to the Court's article III appellate jurisdiction when in fact the Repealer Act evidently created no exception to that jurisdiction and may not have been based on that clause at all. Whatever the incidental correctness or incorrectness of the Court's discussion of that clause, it is a major irony of the case that the entire discussion was quite possibly but an advisory opinion of a constitutional clause not essential in disposing of the case at hand.

## THE CONTINUITY OF *McCardle* AND THE ESSENTIAL CORRECTNESS OF FIRST IMPRESSIONS

In spite of the foregoing criticisms, it is honestly doubtful whether the constitutional significance of *Ex parte McCardle* is at all diminished by them or that the case can so simply be dismissed by means of an ulterior analysis contending that it was merely a minor decision involving the unremarkable rescission of a supplementary procedure briefly made available to a special class of litigants by a year-old statute. Rightly or wrongly, the Supreme Court identified the Repealer Act to the "exceptions" clause of article III and proceeded to address itself directly to the import of *that* clause. Whatever the factual and technical niceties of the Repealer Act (including the fact that it evidently did not withdraw *any* act of Congress from the possibility of constitutional review in the Supreme Court), it is surely more precious than useful to conclude that the Court therefore meant to imply that it really did not think that the clause was made of real stuff or, rather, that the clause really does not cover very much. There is, after all, a fairly plain significance that flows easily from the whole opinion, especially in the larger context of previous and subsequent constructions of the clause—a significance little affected, if at all, by the precaution of Justice Chase's concluding paragraph that the particular statute in issue did not "affect the jurisdiction [of the Court] which was previously exercised."

It is a significance that continued an unwavering line through five consecutive Chief Justices including John Marshall who, as Chief Justice Chase noted in his reference to *Durousseau v. United States*, had declared:

> The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.
>
> When the first legislature of the Union proceeded to carry the third article into effect, they must be understood as intending to execute the power they posessed of making exceptions to the appellate jurisdiction of the Supreme Court. . . .[81]

Marshall's statements, moreover, were but an elaboration of his opinion delivered 5 years earlier in *United States v. More*: "As the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, *prohibiting the exercise of other powers than those described*."[82] This is scarcely different in substance from the observation of his predecessor, Chief Justice Oliver Ellsworth, that "even the appellate jurisdiction is . . . qualified; inasmuch as it is given 'with such exceptions, and under such regulations, as [C]ongress shall make.' "[83] It is manifest as well, albeit in the different setting of original jurisdiction in a federal circuit court, in the reluctant concession by Mr. Justice Story[84] who felt as strongly as anyone on the subject:

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[81] *Id.* at 313-14. Interestingly enough, Marshall had also adverted to the exceptions clause in the course of the Virginia ratification debates:

> What is the meaning of the term *exception*? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.

3 ELLIOT'S DEBATES 560 (2d ed. 1888) (Virginia Convention, June 20, 1788).

[82] 7 U.S. (3 Cranch) 159, 173 (1805) (emphasis added).

[83] Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796).

> The constitution declares, that it is mandatory to the legislature, that the judicial power of the United States shall extend [to all cases and controversies described in article III]. That serious mischiefs have already arisen, and must continually arise from the present very limited jurisdiction of these courts, is most manifest to all those, who are conversant with the administration of justice. But we cannot help them. The language of the act is so clear, that there is nothing on which to hang a doubt.[85]

Marshall's successor, Chief Justice Taney, in spite of the strongest expression that any Justice has ever put forward about the essentiality of the Supreme Court as "the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States,"[86] had also acknowledged the utter dependency of appellate jurisdiction upon acts of Congress:

> By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes.
>
> . . . .
>
> . . . And since this court can exercise no appellate power unless it is conferred by act of Congress, the writ of error in this case must be dismissed.[87]

True, none of these cases involved a particular "exception" which Congress had made or implied in reference to what many would think of as an "essential" function of the Supreme Court—such as its ultimate capacity to pass upon the substantive constitutionality of a state or federal law, or to render a binding (and uniform) construction of a federal law. But this fact may simply attest more to a sense of sound congressional opinion against the general wisdom of making such exceptions than to any impression that it lacked the power to do so—as clearly it believed itself sufficiently empowered in disposing of *Ex parte McCardle*, in spite of the fact that the Act it adopted fortuitously fell short of its object. Indeed, as such exceptions create the possibility of unresolvable conflicts of interpretation among lower federal courts with finality of jurisdiction, or similar conflicts of interpretation among state courts with finality of jurisdiction (should Congress also oust the lower federal courts), or even of vertical conflicts within a single state (depending upon whether the case might originate in either a state or federal court, but not be subject to federal court review by removal or otherwise), one would scarcely expect such legislation routinely to issue from Congress. In no opinion by the Supreme Court touching upon the subject, however, is there any express or implied suggestion that the power to "except" is limited to making "inessential" exceptions.[88] Nor does the final paragraph in *Ex parte McCardle* fairly express such a thought.

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[84] *See* Justice Story's opinion for the Court in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); 3 J. Story, Commentaries on the Constitution of the United States 449-56 (1833). *See also* W. Crosskey, *supra* note 16.

[85] White v. Fenner, 29 F. Cas. 1015-16 (No. 17,547) (C.C.D.R.I. 1818). *See also* Lockerty v. Phillips, 319 U.S. 182 (1943); Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938); Kline v. Burke Constr. Co., 260 U.S. 226 (1922); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Turner v. Bank of North America, 4 U.S. (4 Dall.) 7 (1799).

In his commentaries, Mr. Justice Story also observed that while in his view the "exceptions" clause requires affirmative action by Congress (rather than exceptions by inaction or by implication), it is a broad power:

> . . . It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.
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> . . . .
>
> . . . It [the provision of Article III in respect to appellate jurisdiction] leaves the power of [C]ongress complete to make exceptions and regulations; but it leaves nothing to their inaction.

J. Story, *supra* note 84, at 453, 469.

[86] Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864).

[87] Barry v. Mercein, 46 U.S. (5 How.) 103, 119-20 (1847) (footnotes omitted).

Rather, *Ex parte McCardle*, far more than was true of *Marbury v. Madison*, was not written on a clean slate. Basically, the same Supreme Court had observed only 4 years earlier:

> The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.[89]

Only a dozen years after *McCardle*, moreover, Chief Justice Waite went even further in behalf of an equally unanimous Court by stating, "[n]ot only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not."[90] Even for some of the exceedingly thoughtful critics who would qualify this view, at least so far as the selective removal of *constitutional* issues might be involved by a "regulation" or "exception" otherwise confirming appellate jurisdiction,[91] the general scope of the exceptions clause has been regarded as settled by *McCardle*. Thus, dissenting on other issues in *Yakus v. United States*, Mr. Justice Rutledge nevertheless observed by way of introduction that "[C]ongress has *plenary* power to confer or withhold appellate jurisdiction, cf. *Ex parte McCardle*. . . ."[92] Similarly, in the view of Mr. Justice Frankfurter:

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[88] *But see* Glidden Co. v. Zdanok, 370 U.S. 530, 589-606 (1962) (Douglas, J., dissenting, which might be read this way); (*cf.* note 58, *supra*) Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 324-37 (1796) (Wilson, J., dissenting in part).

[89] Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865) (footnotes omitted).

[90] The "Francis Wright," 105 U.S. 381, 386 (1881).

> Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*. *Ex parte McCardle* . . .[93]

These impressions do, after all, seem to be by far the more natural understanding of the entire *McCardle* opinion. Understood in this unstrained manner, certain portions of the opinion that might otherwise seem puzzling and self-abnegating yield a firm and consistent understanding that the congressional power is plenary, even as Mr. Justice Rutledge understood it to be. Specifically, the *McCardle* Court went out of its way to observe: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[94] Read as implying that the Court must somehow bow to an "exception" even when frank assessment of the legislative record readily demonstrates that the particular statute is not an *authorized* exception, this passage seems odd and artificially self-stultifying of the Court's capacity to decide real cases. Thus, it would seem at once to say that perhaps the congressional power to "except" from the appellate jurisdiction is limited to certain minimum uses originally discussed in the Constitutional Convention of 1787 and in the process of ratification;[95] but that, even so, the Court must wear blinders and decline to consider the validity of a given use as not within that intention even when the evidence may be readily ascertainable and superabundant (as, arguably, it was in the legislative record of the Repealer Act itself).

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[91] If given the power to decide at all, the Courts must, consistent with the oath of office provided in article VI, be free to decide in favor of the Constitution. See Yakus v. United States, 321 U.S. 414, 472 (1944) (Rutledge, J., dissenting); Hart, *supra* note 16, at 1402 ("[J]urisdiction always is jurisdiction only to decide constitutionally"). *See also* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), and discussion in text accompanying note 114 *infra*.

[92] 321 U.S. 414, 472-73 (1944) (emphasis added).

[93] National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (dissenting opinion).

[94] 74 U.S. at 514.

[95] It has been argued, for example, that Congress has the power to "except" only findings of fact determined by a jury. See R. BERGER, *supra* note 16, at 286-89; Merry, *supra* note 16. *But see* J. GOEBEL, *supra* note 16, at 240, 247; and Strong, *supra* note 16. It has been contended that exceptions can be made of certain "cases" enumerated in article III, but not of any of the "questions" which the enumerated "cases" comprehend. W. CROSSKEY, *supra* note 16, at 617-18. Others have suggested,

But this reading of the Court's dictum seems entirely too strained. Taken exactly at face value, the statement declares that the manner in which Congress may presume to use its exceptions power in article III is simply no more subject to constitutional objection than the manner in which it presumes to use any of its other powers as granted by the Constitution. For instance, the unwillingness of the Court to question the use of congressional power to regulate interstate commerce in determining whether a given statute is authorized by article I, section 8, is well established—it is not perceived at all as an instance of putting on judicial blinders or of abdicating the duty of constitutional review. Rather, the Court has already held, in the course of providing substantive constitutional review, that the commerce clause commits to Congress a *plenary* authority over the subject matter of the clause. The power to regulate interstate commerce is simply the power "to prescribe the rule by which [that] commerce is to be governed."[96] Accordingly, Congress may "regulate" that commerce whether or not the effect of such regulation is to diminish (rather than to enhance) its free circulation, and whether or not the palpable objective of the regulation has little or nothing in common with any particular use that some

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however, that exceptions can more generally be made so long as they do not affect the hard core of the national judicial power and are not incompatible with the "essential constitutional functions of the Court." Ratner, *supra* note 16, at 168-73. Possibly, "exceptions" may be made with respect to various modes of review, but only so far as an "irreducible minimum" of appellate jurisdiction is retained adequate to resolve "inconsistent or conflicting federal or state judicial interpretations of federal law, and to uphold the supremacy of federal law over the states in any conflict with state law or authority," and to bring within protective reach of the Court "a citizen's total personal constitutional rights." Forkosch, *supra* note 16, at 256-57. Still again, an exception might be made of certain cases otherwise within the appellate jurisdiction of the Supreme Court by relocating that jurisdiction "at the lower level of judicial administration," in one or more inferior federal courts. J. GOEBEL, *supra* note 16, at 247.

Still another possibility is to suggest that Congress may "except" from the Supreme Court's appellate jurisdiction only to insure greater attention to a given case by requiring that it be considered as matter of original jurisdiction, with the result that all of "the judicial power of the United States *shall* vest in one Supreme Court." But unfortunately, the entire history of the clause does not support this interpretation. A final possibility would have been to regard article III as wholly self-executing once the Supreme Court was established with the Court itself initially the master of the occasions for the use of its own judicial power—exactly as articles I and II vest certain powers in Congress and the President but do not on that account establish any enforceable claims to their particular exercise. Then, reading the "exceptions and regulations" clause as a positive check against the possibility of judicial self-abnegation or refusal to exercise the judicial power, the power to "except" and to "regulate" might mean merely that Congress could *require* the exercise of the judicial power by statute in instances where it disagreed with the Court's refusal to exercise power. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). But again, the whole history of the clause is against this idea.

[96] Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 196 (1824).

may originally have imagined in contemplation of providing for that power.[97] It may, of course, always be a matter of interest to know what the Founders believed to require the inclusion of a given power among the enumerated powers of Congress, but that is scarcely dispositive of the different question respecting the breadth of the power thus given. The "best" or the "wisest" ends that the Founders may have believed impossible to secure without including the commerce power may well explain why the power was provided; they were not, however, simultaneously enacted into the Constitution as positive law restrictions upon its possible use.[98] That there may be (and are) restrictions lying *outside* the clause, and that these may be of the utmost importance and effect (such as the Bill of Rights or article I, section 9), is certainly not to be denied in determining whether a statute, valid insofar as authorized by the commerce clause, is nonetheless unconstitutional because of some other consideration. But that, of course, is quite a different matter.

On balance, there seems to be little reason to depart from this same approach in respect to the exceptions clause, even as suggested by Justice Rutledge in *Yakus* and as declared rather plainly by the Court in *McCardle*, echoing five generations of Supreme Court statements on the subject. The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated and, hopefully, generally to be respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent. In short, the clause is complete exactly as it stands: the appellate jurisdiction of the Supreme Court *is* subject to "such Exceptions and under such Regulations as the Congress shall make."

This view of the matter is by no means disrespectful of scholarly inquiries into the possible interests of the Founders in an exceptions clause, and indeed there is nothing explicit in those inquiries which inexorably supports a different or more limited view of the clause. Rather, they tend to show only that certain uses of the clause were readily anticipated (and at once put into effect in the Judiciary Act of 1789), even without purporting to exhaust the power. For example, some (perhaps most) evidently believed it to be a useful clause principally as a means of safeguarding the finality of jury verdicts in regard to primary adjudicative facts: of safeguarding the right to trial by jury insofar as article III itself would authorize de novo redeterminations of fact in the Supreme Court were no "exception" made by Congress.[99] Others evidently saw additional utility at least in keeping from the Court innumerable civil claims arising in the inferior courts but involving amounts in controversy too small to warrant appellate jurisdiction in the Supreme Court, especially since the physical inaccessibility of the Court might make such appeal of skewed advantage to a given class of litigants.[100] Both of these views are well reflected in the Judiciary Act of 1789.[101] It is clear, moreover, that pursuant to that Act certain cases plainly within "the judicial power of the United States" as described in article III did not vest in *any* federal court, whether originally, by removal or by any other mode of appellate review.[102] Indeed, even federal question jurisdiction (committed for purposes of original jurisdiction almost exclusively to the state courts for the first century following the adoption of the Constitution) could come within the "appellate jurisdiction" of the Supreme Court only under specified circumstances far short of the complete authorization in article III that "all Cases . . . arising under this Constitution [or] the laws of the United States" might come within that appellate jurisdiction had Congress not made exceptions. Thus, under the Judiciary Act of 1789, state court interpretations of federal statutes and the Constitution were made unreviewable by the Supreme Court as a general matter, assuming only that the interpretation of the state court favored, rather than disfavored, the party relying on that source of authority. In these and a variety of other ways,[103] "exceptions" were made that may or may not have altogether harmonized with the personal desires of each individual voting for the "exceptions" clause anticipating its practical use for only one or two purposes, but who nonetheless approved it in its more general form.

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[97] *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971); United States v. Darby, 312 U.S. 100 (1941); Caminetti v. United States, 242 U.S. 470 (1917); Hoke v. United States, 227 U.S. 308 (1913); Lottery Case (Champion v. Ames), 188 U.S. 321 (1903). *See also* Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. — (1973).

[98] Chief Justice Marshall went on to say in *Gibbons v. Ogden*:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . . The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.

22 U.S. (9 Wheat.) at 196-97.

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[99] Professor Goebel points out that the exceptions and regulations clause "was not debated" in the Constitutional Convention, and suggests in passing that "in contemporary state practice, regulation had been confined largely to such details as setting appealable minima or periods of limitation, and 'exceptions' of certain proceedings where neither a writ of error nor certiorari had been traditionally available." J. Goebel, *supra* note 16, at 240. Subsequently, when the proposed Constitution came under attack partly on the basis that the provision for Supreme Court appellate jurisdiction over matters of fact as well as law threatened the "right" to trial by jury, the exceptions clause was adverted to as one means of allaying that anxiety. *See* Merry, *supra* note 16. The references, however, scarcely go so far as to suggest that that is *all* the clause would reach. See, for instance, Marshall's statement in the Virginia Convention, *supra* note 81. Similarly, speaking to the same issue, Governor Randolph hardly limited the potential reach of the clause to such matters when, with specific reference to the exceptions clause, he observed: "It would be proper to refer here to any thing that could be understood in the federal court. They [Congress] may except generally both as to law and fact, or they may except as to the law only, or fact only." III Elliot's Debates 572 (2d ed. 1888) (Virginia Convention, June 21, 1788).

[100] *See* Warren, *supra* note 16.

[101] For example, provision was made for cases within the original jurisdiction of the Supreme Court for jury trial of issues of fact, and the Court's appellate jurisdiction was generally confined to writs of error. Diversity appellate jurisdiction in the Supreme Court was limited to claims exceeding $2,000, and diversity jurisdiction was limited in the lower courts to exclude creditor-assignees.

[102] For example, diversity cases involving less than $500 could not originate in any federal court nor be removed to such a court and a fortiori could not come within the appellate jurisdiction of the Supreme Court by that route. To the extent that such cases originated only in state courts and failed to raise any federal question, neither could they reach the Supreme Court by that route.

Accordingly, in this light the Supreme Court was speaking neither disingenuously nor thoughtlessly when it said, as it did in *McCardle*, that it was not at liberty to inquire into the motives of Congress, but rather was restricted to examining the express power of Congress under the Constitution to make exceptions. At the same time, with all of the thorough scholarship that has sifted through the very slight debates originally attending the exceptions clause, no single and unequivocal utterance has been discovered sufficient to raise a serious question about this matter. It may be true that the lack of attention received by the clause was in significant measure due to the dimness of recognition respecting the judicial power of substantive constitutional review. It is also possible that the review power sprang full blown neither from settled provisions or settled understandings of the proposed Constitution nor, indeed, even from the pen of John Marshall with the relatively early decision in *Marbury v. Madison*. It does, however, appear to be more than a passingly strange argument to suggest that because the full evolution of substantive constitutional review may itself have been exogenous to the Constitution, the power of Congress to make exception of any appellate jurisdiction described in article III therefore does not extend to such review; as though the power to make exceptions applies to any appellate jurisdiction granted by article III, but not to that judicial power which the Supreme Court simply evolved in the full-ness of time.[104]

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[103] For example, federal criminal cases were committed exclusively to the lower federal courts, with no provision for review in the Supreme Court by appeal or writ of error. While recourse to the Court's appellate jurisdiction was provided by means of habeas corpus (and some measure of review was possible upon certification of questions by the lower courts), the means thus provided fell short of confirming the Court's appellate jurisdiction in respect to *all* cases arising under the laws of the United States because habeas corpus would not reach all such cases. See Ratner, *supra* note 16, at 195-201.

Finally, however, no more than is true of the commerce power or any other power of Congress, does any of this imply an absence of constitutional limitations lying outside the exceptions clause but still fully applicable to its every use. Without doubt, the Bill of Rights applies as do the several limitations flowing from article I, section 9.[105] To exclude from review the claims of a readily identifiable group determined by the Court to have been disfavored by Congress as a device of legislative punishment, for instance, might be held to offend the ban on bills of attainder.[106] An "exception" precluding redetermination in the Supreme Court of an alleged "fact" of obscenity when the Court regards the matter as one of "constitutional" fact might be held not to state an instance of excepting a case from appellate jurisdiction, but of impermissibly foreshortening the decisional process in a manner the Court would feel obliged to disregard in light of the first amendment. An exception to the scope of review applicable only in cases where the defendant availed himself of his right to trial by jury, but not when he agreed to a bench trial, moreover, might be held to offend the sixth or fourteenth amendments' protections of the right to trial by jury.[107] Perhaps the simplest illustration would be an "exception" of cases based upon the appellant's race: an exception certain to be held offensive to the fifth amendment's dimension of equal protection.[108] Expanding upon this example, one may plausibly argue that *whatever* basis of classification for excepting certain cases from the Court's appellate jurisdiction Congress may have used, it is necessarily subject to review to determine whether the class thus described is "arbitrary" or "invidious" in the sense condemned by whatever standards of equal protection appropriately applies to the subject matter.[109]

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[104] *Cf.* Strong, *supra* note 16.

[105] Consider also the possibility that the exceptions clause might not apply in respect to the "Privilege of the Writ of Habeas Corpus," suspension of which is specifically forbidden by article I, section 9 (except under the extraordinary circumstances mentioned in that provision). Recent study suggests that "the Constitution's habeas corpus clause is a directive to all superior courts of record, state as well as federal, to make the habeas privilege routinely available," that, notwithstanding Marshall's opinion in *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807), the power of the Supreme Court to issue the writ arises within its original jurisdiction (which is not subject to the exceptions clause) by force of the habeas clause, that its use is not contingent upon any confirming act of Congress, and that "[i]ts use by courts cannot . . . be constitutionally abridged by Executive or by Congress." Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black, J., dissenting). See Paschal, *supra* note 16.

[106] *Cf.* United States v. Brown, 381 U.S. 437 (1965); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

[107] *See* Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?*, 1969 Duke L.J. 291; *cf.* United States v. Jackson, 390 U.S. 570 (1968).

[108] This intriguing possibility I first heard suggested years ago by Mr. Lawrence Wallace (formerly of the Duke faculty and currently with the Office of Solicitor General).

Where the class of excluded cases involves the exercise of "fundamental rights," the appropriate standard of judicial review is the more taxing one which denies any presumption of constitutionality and requires that the government justify the exceptional treatment of the class by demonstrating an imperative connection between the basis for singling out that class and a highly compelling, as well as licit, governmental interest. Arguably, this standard of fifth amendment equal protection review would be applicable to cases "excepted" from the appellate jurisdiction involving criminal convictions under anti-obscenity statutes punishing varieties of speech or expression claimed to be protected by the first amendment—as simply one illustration of a class of cases involving "fundamental" rights.

Accordingly, the class of cases thus "excepted" by Congress should be sustained if (but only if) the government can articulate an imperative connection between that class of cases and a reason for excepting that class which is both licit and compelling. Plainly, considerations of alleged "judicial economy" or similar makeweights ought not be enough in respect to such cases, and the question must inevitably arise whether the most obvious reason would be deemed either licit or compelling by the Court: that Congress excepted that particular class of cases *precisely because it was dissatisfied with the manner in which the Supreme Court had been deciding them in the exercise of its power of substantive constitutional review.* Exactly at this juncture, the Court might again find itself involved in an additional investigation of the functions of the exceptions clause itself, but this time in a different way in order to resolve the fifth amendment objection to the manner in which Congress exercised its power.

If the exceptions clause meant to permit Congress to "check" the Court *specifically in the exercise of substantive constitutional review,* then the categorical exception of any group of cases made by Congress for that very reason cannot possibly be deemed offensive to the fifth amendment's equal protection concern: the exceptions clause *itself* would provide the source for the government's argument that that reason is both licit and compelling enough. If the clause is not seen as approving such a use of the exceptions power, on the other hand, it is difficult to imagine any other basis sufficient for the purpose. At this point, therefore, one's interest in the original understanding of the functions of the exceptions clause takes on a very different importance: not to determine what kinds of "exceptions" Congress may make under the clause *without reference to the fifth amendment*, but what kinds of exceptions Congress may make *given* the subsequent ratification of the fifth amendment *and its requirement of equal protection*? Correspondingly, there is no embarrassment if the answer that now emerges may be a different answer than the Court provided in *Ex parte McCardle*, which was decided long before judicial doctrine had evolved in this aspect of the fifth amendment. Specifically, the fact that consideration of the "exceptions" clause was apparently very casual, and that the examples of its appropriate use never involved any suggestion that it meant to provide a check against felt excesses of the Court in the exercise of substantive constitutional review, and the absence of expressed concern that Congress needed a means of curbing that review (except as to findings of fact), all may be useful to show that such a use is not made a licit and compelling reason by the clause itself. Thus, the use by Congress of the exceptions power to single out a class of cases involving fundamental rights, withdrawn from the Supreme Court's appellate jurisdiction only from dissatisfaction with the Court's exercise of its power of substantive constitutional review in respect to such cases, may, ironically, today be subject to fifth amendment challenge. On the other hand, a bill adopted from motives of retaliation against the Supreme Court would not necessarily betray that purpose on its face and might enable the government to argue that consistent with the face of the bill, it may have been the purpose of Congress simply to leave finality of decision with state courts—a purpose that does find some substantial measure of support in the origins of the exceptions clause and the Judiciary Act of 1789.

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[109] *See generally* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

Nothing in the plenitude of the exceptions clause itself, moreover, nor in combination with any other provision in article III, implies that Congress could fashion a law enabling the government to deprive any person of life, liberty or property without due process; that is, without a fair opportunity to test any nonfrivolous objection to the government's action in an adversary adjudicative forum, including any substantive constitutional objections.[110] Every case sustaining the

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[110] *See* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). The case upheld an act of Congress barring a certain class of claims from *any* court, federal, state or territorial, but only under circumstances where the court had already determined: (a) that such claims were entirely the product of a federal statute; (b) Congress had ample authority to abolish such claims; (c) Congress had in fact abolished them; and (d) the substantive elimination of the claims did not deprive the claimants of substantive due process. As an added precaution, the Court observed:

> We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the [f]ifth [a]mendment. That is to say, while Congress has the undoubted power

power of Congress to forbid the adjudication of a federal question by the state judiciary has been at pains to note that in such circumstances another forum had been provided which the Court deemed sufficient in respect to procedural due process.[111] Similarly, while plenary congressional authority over the jurisdiction of inferior federal courts, when combined with plenary congressional power to make exception to the appellate jurisdiction of the Supreme Court, may provide a possible means to oust certain cases entirely from the federal judiciary, the residual constitutional obligation of state judges "to support this Constitution" would then be drawn into play, exactly as Henry Hart quite properly observed.[112]

But the point is not to exhaust the myriad ways in which the Bill of Rights or other parts of the Constitution function as a set of affirmative restrictions upon the exceptions power or upon any other power of Congress. Nor is it to suggest a sense of complacency that such safeguards are necessarily sufficient as a substitute for additional restrictions that some might prefer to add by amending the exceptions clause itself.[113] To the contrary, it is only to indicate again that indeed they lie outside the clause.

As suggested by one of the preceding illustrations, however, it may happen that what Congress would *claim* to be a statute enacting an "exception" does not in fact except the case from the Court's appellate jurisdiction at all, but rather leaves it within that jurisdiction while attempting to dictate the outcome of a constitutional decision. In such a case, the statute may fail simply for want of power to adopt it,[114] or as an unpermitted corruption of the judicial power to decide the case

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> to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court [in respect to the Supreme Court's original jurisdiction], it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation . . . .
>
> Thus, regardless of whether subdivision (d) of section 2 [which removed jurisdiction of the claims from all courts] had an independent end in itself, if one of its effects would be to deprive the appellants of property without due process or just compensation, it would be invalid.

*Id.* at 257 (footnotes omitted).

What the Supreme Court may deem sufficient to satisfy the fifth amendment requirement of procedural due process is, of course, a separate question. Occasionally, it has taken very little indeed. *See, e.g.*, Fein v. Selective Serv. Sys. Local Bd. No. 7, 405 U.S. 365 (1972); Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944); Murray's Lessee v. Hoboken Land and Imp. Co., 59 U.S. (18 How.) 272 (1855); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845).

[111] *See* Yakus v. United States, 321 U.S. 414 (1944).

[112] *See* Hart, *supra* note 16, at 1401.

[113] *See* Roberts, *supra* note 16.

[114] Congress is nowhere authorized to adopt laws interpreting the Constitution and binding upon the courts in respect to that interpretation. The claim of such a power is in no sense a lesser-included power of that to make "exceptions" to and "regulations" of jurisdiction. This much is settled by Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

consistent with the Constitution,[115] or both. Indeed, even a statute wholly ousting a case from further consideration by the Court, but only after the decisional process had gone forward to determine a particular matter of fact, was rejected by the Supreme Court.[116] It may also happen that a case is not excepted and substantive rules of decision are not imposed contrary to the Constitution, but that an attempt is made to regulate the Court by restricting the *remedy* identified to the very substance of the constitutional right itself. In such an instance, the Court might appropriately determine whether the improper limitation upon its decisional power is severable from the statute otherwise confirming its appellate jurisdiction and simply proceed as it believes to be required, or whether the remedial limitation is so integral to the statute that it must decline to proceed with the case at all, as in instances where Congress has sought advisory opinions.[117] It is at these frontiers that sharp questions must continue to arise with sharp practices.

## CONCLUSION

There are several very substantial limitations upon the power of Congress to curb or to control the Supreme Court.[118] First, as Congress may not overrule or reverse a decision of that Court on any matter involving an interpretation of the Constitution, neither may it seek to direct the outcome of constitutional adjudication by legislating a rule of decision which, if applied, would produce a judgment that the Constitution forbids. Nor may Congress accomplish that result by legislating the selective removal of constitutional questions while otherwise providing that an affirmative decision shall issue on the merits of the case. Nor may it so drastically restrict the character of any remedy which the Court would otherwise be free to provide that the result in a particular case would involve the Court in an affirmative denial of a constitutional right or in the affirmative application of an unconstitutional law. None of these devices is a "lesser-included" power of the power to make exceptions to the appellate jurisdiction of the Supreme Court. Rather, each involves a different claim to power nowhere granted to Congress: to press the processes of the Court into service as an active agent of government action inconsistent with a valid constitutional claim. Viewed as a "regulation" of the Supreme Court's appellate jurisdiction (rather than as an "exception"), moreover, each device should fail for the reason that the power to decide at all must include the power to decide according to the Constitution, consistent with the judicial duty and oath of office to support that Constitution.[119]

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[115] *See* Yakus v. United States, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting) ("While Congress has plenary power to confer or withhold appellate jurisdiction, *cf, Ex parte McCardle*, 7 Wall. 506, it has not so far been held, and it does not follow, that Congress can confer it, yet deny the appellate court power to consider constitutional questions relating to the law in issue"); *accord*, Payne v. Griffin, 51 F. Supp. 588, 591 (M.D. Ga. 1943):

> If Congress prohibits an inferior court from trying a case, the court cannot entertain it and, if Congress confers jurisdiction to try a case, the court cannot refuse to accept jurisdiction . . . . But, having directed the court to try the case, Congress has no authority also to direct the court to render judgment in accordance with the terms of a void act in disregard of the supreme law of the land. The distinction is that, while Congress can determine what cases a court can try, it cannot direct what law shall control the decision.

*See also* Hart, *supra* note 16, at 1402.

[116] United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

[117] *See, e.g.*, cases and references collected in Muskrat v. United States, 219 U.S. 346, 352-60 (1911). An illustration of this problem may well have been present in one or another of the proposed anti-busing bills urged upon Congress by the President in the summer of 1972. See text of note 14 *supra*. *See also Hearings on H.R. 13916 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

[118] Consistent with these limitations, it is frankly doubtful whether *any* of the bill referred to in the text accompanying notes 9-14 *supra*, would have survived constitutional challenge.

Second, such "exceptions" as Congress shall deem necessary and proper to make within its authorized power are nonetheless fully subject to review under article I, section 9, the Bill of Rights and other constitutional provisions uniformly applicable to *all* acts of Congress. Granted that the power to except is as plenary as the power to regulate commerce among the several states, for instance, there is no reason to suppose that it is less subject to the first or the fifth amendments than would be true of a regulation of commerce.[120]

Third, even in combination with all other powers of Congress, the power to make exceptions of certain cases in the Supreme Court does not mean that Congress may act to deprive any person of life, liberty or property without due process of law. Due process does not require either a hearing or an appeal in the Supreme Court. It does require, however, at least one fair hearing in a judicial setting which, in light of the claim that is asserted, conforms to the Supreme Court's stated requisites of procedural due process. Presumably, Congress may reserve certain claims to particular inferior federal courts, or innovate other federal courts, and deny review in the Supreme Court pursuant to the exceptions clause. Alternatively, it may fail to vest original jurisdiction in any inferior federal court and except to any appellate jurisdiction by the Supreme Court. In that event, however, the residual obligation of the state judiciary to provide a forum consistent with procedural due process would be triggered. Correspondingly, the omission of any state forum under the circumstances would be subject to successful challenge as a denial of procedural due process.

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[119] This is not to deny, however, that constitutional questions may be reserved to some special proceeding. See Yakus v. United States, 321 U.S. 414 (1944).

[120] While the question is less free from doubt given the heavy weight of judicial precedent as against the apparent plain meaning of the clause plus recent scholarly research, it is arguable that the habeas corpus clause of article I, section 9, lies beyond the power of Congress to make exceptions to the jurisdiction of the Supreme Court. If the suggestion is correct that the power to issue that writ runs directly to the Supreme Court's original jurisdiction (rather than to its appellate jurisdiction), the exceptions clause does not even purport to reach it. Even assuming that the "privilege of the writ" is in whole or in part a function of the Court's appellate jurisdiction, it remains arguable that its independent provision in the Constitution states a positive exception, limiting the authority to suspend it to the particular circumstances stated in the clause: "when in Cases of Rebellion or Invasion the public Safety may require it."

In addition to these considerations, the general inexpediency of a headless inferior federal judiciary or an array of final state courts—brought about by lopping off the means of reconciling conflicting interpretations of national law and of the Constitution short of the Supreme Court—must not be discounted as a major restraining influence upon the practical use of the exceptions clause. As to this, however, *Ex parte McCardle* does provide an instance when Congress once believed that it would prefer that course, and there is ultimately very little on which to stand in disagreement with those who decline to cavil with its meaning. As Professor Wechsler put the matter less than a decade ago:

> I see no basis for this view [that the exceptions clause has a narrow meaning, not including cases of constitutional dimension] and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[121]

This does appear to be the most accurate statement of the matter. Consistent with the plan, and subject to the limitations reviewed,[122] Congress may make exception to the appellate jurisdiction of the Supreme Court even of cases of constitutional significance. By reposing finality of such decisions in a number of other courts, it might thereby give the Constitution a number of different heads on the order of the mythical Hydra, however peculiar we might think the result to be in the dimming twilight of federalism.

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[121] Wechsler, *supra* note 16, at 1005-06.

[122] See especially text and footnote discussion at note 106 *supra*.

# CONGRESSIONAL POWER OVER THE LABOR INJUNCTION

## I

The new year has already yielded impressive testimony to emphasize the conflict between the operation of the injunction in labor controversies and the ethical considerations of fair dealing which are the substratum of equity jurisdiction. Governor Ely[1] of Massachusetts, Governor La Follette[2] of Wisconsin, and Governor Roosevelt[3] of New York have followed their predecessors in urging their respective legislatures to correct disclosed abuses in the judicial administration of the labor injunction. New and weighty reinforcement is given to current criticisms of the labor injunction by the report of a special committee of the National Civic Federation. These are its essential findings:

> "A most careful and thorough examination has been made of injunctions issued in labor disputes in our State Courts as well as in our Federal Courts (as indicated in the record annexed) which study has clearly indicated the validity of the complaint made by labor that the injunction writ has been subject to many abuses, thus confirming as well the declarations of the two major political parties, which have expressed themselves upon this question.

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[1] "In accordance with the definite recommendation of the platform upon which I was elected, and the progressive thought of the country, I recommend the abolition of injunctions and restraining orders in labor disputes except after a hearing of the parties. I think that if a short order of notice were issued it would operate in most cases to prevent violence pending the hearing of the cause, and the recommendations here made would certainly prevent any unfair advantage being taken by employers." Address of his Excellency Joseph B. Ely to the General Court of Massachusetts, January 8, 1931 (Senate No. 1, p. 26); U. S. Daily, Feb. 16, 1931, Sec. II, at 39.

[2] "Fifteen years ago the inclusion of the Federal Clayton Act of provisions aimed at preventing the abuse of the injunction in labor disputes was hailed as a Magna Charta for labor. In 1917 this measure was adopted by Wisconsin. Subsequent judicial interpretations of these provisions have emasculated them. I urge the revision of this legislation in the light of the investigation of the use of injunctions recently undertaken by the Judiciary Committee of the United States Senate as well as the experience of Wisconsin. While there may be disagreement over particular aspects of economic legislation adopted by a government, we ought to have no uncertainty in according every legal and practical encouragement to the development of organizations of industrial workers and farmers of Wisconsin." Message of Gov. Philip La Follette to the Wisconsin legislature, Regular Session 1931, January 15, 1931; U. S. Daily, Feb. 16, 1931, Sec. II, at 41.

[3] "Although this state has taken the lead in labor legislation, there are still certain requirements which are necessary in order to keep step with the newest developments in industrial life and the newest conceptions of social welfare. I recommend to you the following program: . . . . .

"6. Declaration in the form of a statute that the labor of human beings is not a commodity or an article of commerce." Annual Message to the State Legislature, January 7, 1931, New York Times, Jan. 8, 1931, at 2; U. S. Daily, Feb. 16, 1931, Sec. II, at 39. And see also the Messages of the governors of Minnesota and Nebraska, *ibid.*

> "Your committee has, therefore, no hesitancy in recommending the advisability of remedial legislation on this subject. Indeed, it deems it imperative, if the workers are to be assured that the judiciary of our land and the great powers vested in it are not being unduly and unwarrantedly used in determining the industrial relations and policies that should govern our industrial life."[4]

These utterances are not novelties or exercises in rhetoric. They epitomize a long and painful chapter of history. They derive from a widely entertained conviction that, in the arena of industrial controversy, the mechanism of legal justice breeds injustice, the forms of equity give rise to inequity. The momentum of this conviction, now gathering for more than a generation, was behind the original Shipstead Bill, a national proposal in which the hopes that were frustrated by the Clayton Act sought new fulfillment.

S. 2497 was introduced by Senator Shipstead of Minnesota shortly after the opening of the regular session of the Seventy-first Congress in December, 1929.[5] By this bill (a redraft, in effect, of S. 1482, of the Seventieth Congress)[6] Senator Shipstead adopted the conventional requirement of irreparable damage to property as the touchstone of equitable jurisdiction, but drastically narrowed the conception of property: ". . . nothing shall be held to be property unless it is exclusive, tangible and transferable."

The bill was referred to the Senate Judiciary Committee, whose subcommittee quickly reported a substitute bill, practically identical with the bill which it proposed at the previous Congress, after extensive public hearings[7] and much deliberation. The substitute bill slumbered in committee[8] when, on March 21, 1930, the President nominated for the seat on the Supreme Court vacated by the death of Mr. Justice Sanford, Judge J. J. Parker of the Circuit Court of Appeals for the Fourth Circuit.[9] That judge, writing for his Court, had, in 1927, affirmed a whole series of decrees on behalf of some three hundred complainants embracing most of the coal companies operating on a non-union basis in the southern West Virginia fields.[10] After lengthy hearings the Judiciary Committee reported adversely on the nomination of Judge Parker. In view of the controversies which the Parker nomination aroused throughout the country, the debate in the Senate, when the matter came before it, naturally led to an extensive discussion of the doctrines and practices of the federal courts in labor litigation. On May 7 the nomination of Judge Parker was rejected.[11]

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[4] Published January 7, 1931, by The National Civic Federation.

[5] 72 Cong. Rec. 276 (1929). The text of the bill appears in an Appendix to this article.

Representative LaGuardia, of New York City, a Majority member of the House Committee on Judiciary, on Dec. 4 introduced a bill (H. R. 14458), similar to the Shipstead anti-injunction bill in the Senate, amending the Judicial Code to define and limit the jurisdiction of equity courts as to remedies for irreparable injuries. It provides the following amendment: "Section 28. Equity courts shall have jurisdiction to protect property against irreparable injury arising from definite destructive action when there is no remedy at law: For the purpose of determining such jurisdiction the expression 'remedy at law' shall be held to be any remedy, criminal or civil, provided by legislation and nothing shall be held to be property unless it is exclusive, tangible and transferable; and section 4, of the Anti-Trust Act of 1890, together with all amendments thereof and all laws and parts of laws inconsistent herewith are hereby repealed." U. S. Daily, Dec. 5, 1930, at 3036.

An earlier House Bill introduced in the previous Congress is H. R. 122, "defining combinations and conspiracies in trade and labor disputes and prohibiting the issuance of injunctions therein." 71 Cong. Rec. 29 (1929).

[6] For the story of this bill, see Frankfurter and Greene, The Labor Injunction (1930), at 47-8, 206-7. This volume will hereafter be referred to as The Labor Injunction.

[7] *Ibid.*, at 208 *et seq.* The substitute bill in its earlier form is reprinted at 279-288. Its origin and history are thus stated by Senator Norris: "At the close of

The course of the Senate debate[12] had focussed so strongly upon the defects of the existing situation that the Judiciary Committee could no longer withhold action upon proposed measures dealing with federal equity practice in labor cases. Senator Norris' subcommittee again

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the hearings the subcommittee, after reaching the conclusion that some legislation on the subject was demanded in the public interest and that the bill in the form in which it was introduced did not fully meet the requirements, called into consultation attorneys and economists who had made special study of the question. The subcommittee invited Prof. Felix Frankfurter, of the law school of Harvard University, Cambridge, Mass.; Herman Oliphant, former professor of law at Columbia University, now a member of the faculty of the institute of law, the Johns Hopkins University, Baltimore, Md.; Prof. Francis B. Sayre, law school of Harvard University, Cambridge, Mass.; Mr. Edwin E. Witte, chief of the legislative reference library, Madison, Wis.; and Hon. Donald R. Richberg, attorney, of Chicago, Ill. With the assistance of these gentlemen, a substitute bill was prepared by the subcommittee and as such was reported to the full committee." SEN. REP. No. 1060, Part 2, 71st Cong., 2d Sess., at 5.

[8] Senator Norris gives the history of the measure in the 71st Congress: "Soon after the beginning of the regular session of the Seventy-first Congress the present bill (S. 2497) was introduced (December 9, 1929) and referred to the Judiciary Committee. The Judiciary Committee again referred the bill to the same subcommittee which had handled the matter in the Seventieth Congress. It will be noted that the present bill, in theory and design, is practically the same bill which was introduced in the Seventieth Congress (S. 1482) and therefore the subcommittee did not feel that additional hearings were necessary. Nevertheless, limited hearings were held by the subcommittee and attorneys representing corporations and organizations opposed to the enactment of this kind of legislation were permitted to file written briefs." *Ibid.*

[9] 72 CONG. REC. 5849. "John J. Parker, of North Carolina, to be an Associate Justice of the Supreme Court of the United States, vice Edward T. Sanford, deceased."

[10] International Organization, Etc. v. Red Jacket C. C. & C. Co., 18 F.(2d) 839 (C. C. A. 4th, 1927), *cert. den.*, 275 U. S. 536 (1927).

[11] For reference to the Committee Report, see 72 CONG. REC. 7309; for the record vote of the Senate, see 72 CONG. REC. 8487.

[12] Some of the important speeches against Judge Parker are reprinted in a pamphlet published by the American Federation of Labor under the title, *Yellow Dog Contracts, Menace to American Liberties.* All of the Parker material will be found in 72 CONG. REC. 6569, 7449, 7793, 7808-22, 7930-54, 7976, 8021-48, 8086, 8098, 8120, 8181, 8337, 8358, 8423, 8475, 8567. Reprints of newspaper comment on the rejection appear *ibid.*, at 8713, 8847, 8893, 9054, 9141, 10007.

reported its measure to the full Committee, which accepted it with some minor amendments. But a motion to report the bill favorably to the Senate was defeated. Instead, the measure was submitted to the Attorney General[13] for opinion upon objections by some of the Committee. The Attorney General having declined to give his opinion, a divided Committee reported adversely upon the amended substitute bill. On June 20, 1930, Majority[14] and Minority[15] Reports were submitted to the Senate. Such was the parliamentary situation concerning this bill when Congress again convened last December, and the measure will doubtless die with the Seventy-first Congress. That the bill will be reintroduced in the Seventy-second Congress and be pushed to vote—certainly in the Senate—is the announced program of those who are expected to control the calendar in the new Senate. We are dealing with proposals which will continue to be before Congress and the country.

The desired legislation attacks the two major sources of complaint against the use of injunctions in labor disputes: Defects in procedure and undue scope of relief. The procedural changes rest upon distrust of allegations in complaint and affidavits as an adequate basis of fact, where, as in labor litigation, an injunction, though temporary in form, is normally permanent in its effect upon the controversy. The substantive provisions proceed from the belief that the injunction unless rigidly confined in application leads to grave abuses that intensify rather than compose industrial conflicts. We have elsewhere avouched experience[16] for these assumptions. The minority of the Senate Judiciary

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[13] Correspondence between Senator Norris, "pursuant to the instructions of the Committee on the Judiciary," and Attorney General Mitchell is reprinted in *Report of Senate Committee on Judiciary*, No. 1060, 71st Cong., 2d Sess., at 15-16. Senator Norris's reply to the Attorney General, which does not appear in this report, follows: "My Dear Mr. Attorney General: Your letter of June 3 has been received. I presume you understand that the communication signed by me as chairman of the Senate Committee on the Judiciary, as stated in the communication itself, was sent to you under the direction of the Committee. Personally, I was opposed to referring the bill, S. 2497, to you, but a majority of the Committee decided in favor of such action and I presume you understand that in my communication I was acting in my official capacity as chairman of the Committee. This letter is my own personal statement to you.

"I agree with you wholeheartedly in the conclusion you have reached and I personally want to commend you for the action you have taken. I shall lay your communication of June 3 before the Committee and will then comply with any request made by the Committee pertaining to an official answer thereto." U. S. Daily, June 10, 1930, at 1148.

[14] Senator Steiwer, for the Committee on the Judiciary, submitted a Report to accompany S. 2497. This (Report No. 1060, 71st Cong., 2d Sess.) expressed the views of the majority of the Committee, and will hereafter be referred to as the Committee Report.

[15] Senator Norris submitted Minority Views (Report No. 1060, Part 2, 71st Cong., 2d Sess.) which were signed by himself and Senators Blaine, Walsh of Montana, Borah, Caraway, Ashurst, and Dill.

[16] *Supra* note 6.

Committee relies on this experience. The majority rejects its lesson, and, believing, hopefully, that "with certain relatively minor exceptions the trend is toward industrial peace," concludes that "there is less compelling reason for the enactment of Federal legislation than formerly existed."[17] The bitter feeling which organized labor harbors against the abuses of the injunction as a deep injustice, hardly presages an era of "industrial peace." But prophecy must be left to the judgment of time. In what follows, we shall consider objections to the bill by the majority which are amenable to the present tests of reason.

## II

Section 2 articulates the social and economic considerations that inspired the proposed Act, and explicitly declares the public policy which is to govern the judiciary in its application. In its details the measure under discussion is so dependent upon this declaration that its exact text is most important:

> "In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:
>
> "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

This section begins with liberty of contract, but does not end there. It clothes an abstraction drawn from early nineteenth-century individualism with the concrete realities of modern large-scale industry, its consolidations and *cartels*, its "integration" and "rationalization." It recognizes as fact for law, as well as for life, that today the opportunity for employment of large numbers is within the keeping of a single enterprise; that the individual workman has only a Hobson's choice, and is therefore devoid of real liberty to contract;

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[17] *Supra* note 14, at 14-15.

that consequently "liberty of contract" does not begin until there is substantial equality in bargaining power, and is meaningless without it.

The majority does not attempt to meet the recitals in Section 2 or deny their social and economic import. But they find the declaration of policy an invasion of state prerogatives. Their report challenges the right of Congress "through its control over Federal courts, by indirection to impose one pattern of industrial relationships upon the industries of the country, regardless of local conditions." For federal authority to stray out of its bounds by adopting "the statement of public policy set forth in this bill regardless of its conflict with economic realities in many States might well be resented by the States."[18] This attack is basic; if justified, it undermines the bill.

"States' rights" as a slogan has the vitality of a low organism.[19] Invariably it is the voice of obstruction when federal legislation is invoked. But never has it been put to more sardonic use than in the present instance. The federal judiciary has for decades set the pace not only in the abundance of labor injunctions or in the breadth of their application and in the ever widening ambit of their interdiction, but also in fashioning legal restraints upon the organized activities of workers which "reminds of involuntary servitude."[20] Federal courts have frankly refused to follow state policy[21] and have intervened in such local affairs on the basis of their conception of some transcending national policy. But Congress is powerless to bring such decisions in conformity with its determination of the national policy! Federal courts can invade state policy by judge-made law. But Congress is impotent to define law for the general guidance of its own creations!

Through two sources of jurisdiction the federal courts have voluminously interfered in local industrial situations in ways which the majority of the Senate Judiciary Committee now deems immune against legislative correction. In applying the federal anti-trust laws, those courts have, in labor cases, revived ancient doctrines of conspiracy, widened the concept of interstate commerce, given farthest reach to the incidence of "unreasonable restraint of trade." Within the past two years cases in the Second, Third, and Seventh Circuits have newly attested the pervasive capacity of the anti-trust laws to curb labor activities. In *Aeolian Co. v. Fischer*,[22] the question was whether a local union might insist that the work of installing organs within the locality should be done by union labor. The fact that the organs to be installed came from another state was the only interstate element. The defendant union did not use the strike in one state to achieve a result in another, but only to affect local working conditions. Nevertheless, the Circuit Court of Appeals felt itself bound by Supreme Court rulings to hold that interstate commerce was being restrained, and supported federal jurisdiction. This achieved, the Court disregarded, as past decisions again gave it freedom so to do, the law of the New York courts,[23] which had sanctioned union activities similar to the ones challenged in the *Aeolian* case. In the Third Circuit the question was whether the local branch of a national union might attempt by strikes to unionize local factories. The only interstate element was the fact that approximately eighty per cent of the local product was shipped in interstate commerce. This was deemed to justify the application of federal law.[24] Finally, the government proceeded against a painters' union in Chicago because of its refusal to work on buildings in which completely painted kitchen cabinets were being installed instead of unfinished cabinets, as the union required. The fact that the cabinets came from another state subjected the union to the consequences of federal law.[25]

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[18] *Supra* note 14, at 6.

[19] 2 BEARD, THE RISE OF AMERICAN CIVILIZATION (1928) 40 *et seq.*

[20] Brandeis, J., dissenting in Bedford Co. v. Stone Cutters Assn., 274 U. S. 37, 65, 47 Sup. Ct. 522, 531 (1927).

[21] See B. & W. Taxi Co. v. B. & Y. Taxi Co., 276 U. S. 518, 48 Sup. Ct. 404 (1928).

[22] A preliminary injunction was denied by Judge Thacher, 27 F.(2d) 560 (S. D. N. Y. 1928). The order denying this application was affirmed, 29 F.(2d) 679

In labor cases, the courts do not apply the distinctions between direct and incidental interferences with interstate commerce,[26] restraints and unreasonable restraints,[27] by which the intra-state activity of busi-

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(C. C. A. 2d, 1928). The bill of complaint was dismissed by Judge Thacher after final hearing, 35 F.(2d) 34 (S. D. N. Y. 1929). This was reversed in 40 F.(2d) 189 (C. C. A. 2d, 1930), Circuit Judge Manton writing the opinion, concurred in by Circuit Judge Chase. Circuit Judge Augustus Hand wrote a special concurrence, finding himself controlled by Supreme Court decisions.

[23] The lower court, in dismissing the bill, had relied, in part, upon New York state court decisions holding that the activities in question were legal. See 35 F.(2d) 34, 37 (S. D. N. Y. 1929).

[24] Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F.(2d) 203 (E. D. Pa. 1929). An editorial discussion of this case, which appeared in the Washington News, is reprinted in 71 CONG. REC. 4472. The case was debated in the Senate, 71 CONG. REC. 3639, 4059. *Cf.* Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 Sup. Ct. 83 (1922).

[25] United States v. Painters' Dist. Council No. 14, etc., 44 F.(2d) 58 (N. D. Ill. 1930). A consent decree was entered in a substantially similar case in the District Court of Missouri, on December 31, 1930. United States v. Painters' District No. 2, etc.

[26] The District Court opinion in Aeolian Co. v. Fischer, 35 F.(2d) 34 (S. D. N. Y. 1929), after concluding that interstate commerce was involved, went on to say (at 36): "But from this conclusion it does not necessarily follow that the defendant unions . . . may not consistently with federal statutes combine, and in combination refuse to work. . . . Such a combination would not violate the federal statute because its effect upon interstate commerce would be indirect and incidental to the purely local purpose, by group action, to prevent the employment of non-union labor in the manufacture of goods under contracts for delivery in interstate commerce." This was reversed by the Circuit Court of Appeals, *supra* note 22.

[27] Mr. Justice Stone, writing a specially concurring opinion in Bedford Co. v. Stone Cutters Assn., 274 U. S. 37, 55, 47 Sup. Ct. 522, 528 (1927), said: "As an

ness enterprises is saved from subjection to the anti-trust laws. By loose use of familiar forms of words the federal courts may bring within their net every activity of organized labor affecting products which in whole or part are destined for interstate commerce or which at some time may have been within its stream. Such a conception of the overruling scope of interstate commerce, were it applied in other fields of commercial regulation, would largely dislocate the present balance of adjustments between states and nation. Labor finds itself outside of these adjustments. Litigation may raise essentially local issues of law and policy that have no bearing upon effective exercise of the normal scope of federal authority. Nevertheless, such labor issues are settled by federal authority, and, if one chooses so to phrase it, under the federal "pattern of industrial relationships . . . regardless of local conditions."[28]

This is not all. If we turn to the jurisdiction that federal courts exercise by virtue merely of the diversity of citizenship of the parties,

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original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of Standard Oil Co. v. United States, 221 U. S. 1; United States v. American Tobacco Co., 221 U. S. 106, 178-180, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade. But in Duplex Printing Press Co. v. Deering, 254 U. S. 443, these views were rejected by a majority of the court. . . ."

See Frey, *The Double Standard in Applying the Sherman Act* (1928) 18 Am. Lab. Leg. Rev. 302.

[28] The recent National Civic Federation Report (*supra* note 4) reaches a similar conclusion: "We believe that there ought to be a change in the substantive law in this regard and to this effect. In reviewing the cases of injunctions as issued in industrial disputes under the Sherman Anti-Trust Law, we find that the interpretations as to interstate commerce and trade have been so widely extended as to embrace almost every intrastate activity of labor. We feel confident that, if a like interpretation of interstate commerce and trade would govern our federal courts, in cases arising out of business controversies, our states would be shorn of a great proportion of cases that now can only be presented to our state courts. For instance, if the principle as laid down in the Bedford Stone case were to be applied to all business controversies, there would be indeed very little intrastate activity, but in the main interstate activities involved. Hence, litigation would become more and more centralized in our federal courts. Indeed in so far as organized labor activities are concerned, if the principle as laid down in this case were literally adhered to and enforced in all instances, organized labor of America would find itself with the theoretical right of organization recognized but with the power of proper functioning almost wholly restricted. Such a condition is certainly not in keeping with the spirit of our democratic institutions and the conception of the relationship that should govern between industry and state, and it certainly does afford those opposed to our democratic institutions the opportunity of directing the attention of American wage earners to the idea that they are not free agents within industry, but instead are subject to constant regulation by our federal courts. Your committee believes that this situation ought to be remedied, in so far as substantive law is involved, and that labor should be accorded equal opportunity to work out its salvation and its destiny in our industrial life with that of capital and management."

what becomes of the theory that a "federal pattern of industrial relationships" would be an innovation? Circularization of an unfair list was deemed legal by the California State Court,[29] but a federal court in California found the same practice illegal. To be sure, it invoked the familiar doctrine that "the federal courts are not . . . excepting so far as affected by local statutes, administering the laws of the state in which they sit, but are administering the law as applicable to all the states."[30] But this merely gives abstract form to the essential fact that, if the accident of a particular litigation brings it into a federal rather than a state court, California policy is irrelevant to the determination of California affairs and that, too, in matters peculiarly within the competence of local social policy.

Two of the thorniest questions in the whole of labor law—the right of unions to enlist workmen to join a union and the amenability of unions to suit—came before the Supreme Court by way of diversity jurisdiction. In the *Hitchman* case,[31] raising the first of these problems, the Court did not rest on state policy as enunciated by the State Court. It formulated its own general policies, and doctrines thus announced by the Supreme Court in a case that came from West Virginia have been applied by inferior federal courts in Indiana, Missouri, New York, Ohio, and Pennsylvania,[32] heedless of any disparities between the views in the *Hitchman* case and state policies in those states. So in the *Coronado Coal* case,[33] which involved the suability of a labor union, the Court was not sensitive to the "pattern" of Arkansas law:[34]

> ". . . we think that such organizations are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes. The fact that the Supreme Court of Arkansas has since taken a different view in *Baskins v. United Mine Workers of America, supra* [150

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[29] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 844 (1909).

[30] Loewe v. California State Federation of Labor, 189 Fed. 714, 715 (N. D. Cal. 1911).

[31] Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

[32] Vonnegut Machinery Co. v. Toledo Machine and Tool Co., 263 Fed. 192 (N. D. Ohio 1920); Quinlivan v. Dail-Overland Co., 274 Fed. 56 (C. C. A. 6th, 1921); Montgomery v. Pacific Electric Ry. Co., 258 Fed. 382 (C. C. A. 9th, 1919); 293 Fed. 680 (C. C. A. 9th, 1923); Kinloch Telephone Co. v. Local Union No. 2, 275 Fed. 241 (C. C. A. 8th, 1921); Armstrong v. United States, 18 F.(2d) 371 (C. C. A. 7th, 1927); Alco-Zander Co. v. Amalgamated Clothing Workers, *supra* note 24; Aeolian Co. v. Fischer, *supra* note 22.

[33] United Mine Workers v. Coronado Co., 259 U. S. 344, 42 Sup. Ct. 570 (1922).

[34] We do not mean to hint by what is said in the text that as a matter of policy we do not agree with the *Coronado* doctrine. See Frankfurter, *The Coronado Case* (1922) 31 NEW REPUBLIC 328.

> Ark. 398] cannot under the Conformity Act operate as a limitation on the federal procedure in this regard."[85]

Through these cases the Supreme Court has announced policies nation-wide in their operation through their authority upon the lower federal courts, and, by virtue of the Supreme Court's prestige, influential in determining state policies in so far as state courts determine them.[86] These are actualities and must be dealt with as such. A federal "pattern" governing the disposal of industrial litigation exists, and federal courts have woven it.

One mode by which Congress may intervene in the situation was indicated by Senator Borah in the course of the Parker debate:

> "They [the Justices of the Supreme Court] pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon all of these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Bench something of their views on these questions."[87]

And this viewpoint was recently supported by a thoughtful lawyer of wide experience in the field of public law:

> "As I see the situation, the present attacks and criticism in the Senate are not in the last analysis transient or factional, but are fundamentally based upon the proposition that the exercise of a semi-legislative function by the court carries with it a semi-legislative and not merely a judicial responsibility to the people."[88]

Is it wise merely to evoke this political power of surveillance by the Senate, rather than to draw upon the function of Congress to formulate directly legislative standards for judicial application?

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[85] 259 U. S. at 391, 42 Sup. Ct. at 576. The decision in the particular case may well have rested alone upon the specific language of sections 7 and 8 of the Clayton Act which defined the persons who might be sued to include "corporations and associations existing or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." The Coronado case was extended from application to a national union to application to a local union, Christian v. International Ass'n of Machinists, 7 F.(2d) 481, (E. D. Ky. 1925); but see limitations of doctrine illustrated by *Ex parte* Edelstein, 30 F.(2d) 636 (C. C. A. 2d, 1929). See Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 HARV. L. REV. 977, and Frankfurter, *op. cit. supra* note 34. For criticism of the Coronado case, see WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929), c. IX. *Cf.* Society Brand Clothes, Ltd., v. Amalgamated Clothing Workers, decided by the Cour de Banc du Roi (Canada), Nov. 29, 1930.

[86] Recent examples of this are Ossey v. Retail Clerks' Union, 326 Ill. 405, 158 N. E. 162 (1927); Gevas v. Greek Restaurant Workers' Club, 99 N. J. Eq. 770, 134 Atl. 309 (1926). See THE LABOR INJUNCTION, at 180, n. 182; at 181, n. 184.

[87] 72 CONG. REC. 7932.

[88] Warren H. Pillsbury, a leading California lawyer, in the *The Summons* (Bancroft-Whitney publication) Vol. 2, No. 7 (1930).

Thus the Majority Report is not only unfounded in law, but mischievous in its implications. The policy stated in Section 2 makes no new inroads upon the preserves of state power. Rather, it represents a considered effort by Congress to formulate principles for the settlement of controversies that federal courts have settled and will continue to settle, whether this bill is enacted or not.[39] To ask: May Congress adopt a federal law for industrial litigation? is to pose a misleading issue. A candid regard for fact would ask: May Congress exercise its responsibility for formulating rules and practices for controversies that are now determined by individual conceptions of policy more or less conscious in the minds of judges, and conform such notions to explicit legislative expression of national policy?

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[39] Another important example of national influence upon purely local labor troubles is found in the work of The Conciliation Service of the Department of Labor. See, *e.g.*, *Annual Report of the Secretary of Labor* for fiscal year ending June 30, 1928, at 10-27. The following is given as a summary of conciliation work that year (at 12):

During the fiscal year ended June 30, 1928, conciliators were assigned to 478 industrial disputes; of this number 307 were settled directly by the commissioners, 53 cases were pending at the end of the fiscal year, 57 cases were recorded as "unable to adjust" and 61 cases are carried as "unclassified." The latter designation implies that settlement was immediately effected by the parties directly interested; the commissioner arrived after agreement was reached; or the case referred for conciliation did not warrant services of representative. In some cases plants were permanently closed, or the workers had gone elsewhere, and so on. In addition to the cases arising during the time covered by this report, 13 cases coming over from previous years were also adjusted.

*Cases Reported from Various States During the Fiscal Year 1928, by Months*

| | *July* | *Aug.* | *Sept.* | *Oct.* | *Nov.* | *Dec.* | *Jan.* | *Feb.* | *Mar.* | *Apr.* | *May* | *June* | *Total* |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Arizona | | | | | | 1 | | | | | | | 1 |
| California | 2 | | | | 1 | 2 | | | | 3 | 1 | 2 | 11 |
| Colorado | | | | 1 | 1 | | | | | 1 | | | 3 |
| Connecticut | 1 | | 1 | | 2 | | 2 | | | | 1 | 5 | 12 |
| District of Columbia | | | | | | | | | 1 | | 1 | 1 | 3 |
| Illinois | 3 | 6 | 2 | | 4 | 1 | 2 | 2 | 2 | 2 | | 5 | 29 |
| Indiana | 1 | 2 | | 4 | 6 | 3 | 4 | | 1 | 2 | 5 | 3 | 31 |
| Iowa | | 1 | | 1 | 3 | | | 3 | 1 | 1 | 3 | 2 | 15 |
| Kentucky | 1 | 2 | | | | | | | | | 1 | | 4 |
| Maine | | | | | | | | | | 2 | | 2 | 4 |
| Maryland | 1 | | | | | | | | | 1 | 4 | | 6 |
| Massachusetts | 5 | 5 | 3 | 3 | 3 | 3 | 4 | 3 | 6 | 5 | 3 | 5 | 48 |
| Michigan | | | | | | | 1 | | | | 1 | 1 | 3 |
| Minnesota | | | 2 | 4 | | | | | | | | | 6 |
| Missouri | | | | | 4 | | 1 | 2 | | 1 | 2 | | 10 |
| Montana | | | | | | | | | 1 | | | | 1 |
| New Hampshire | | | | | | | | | | 4 | | | 4 |
| New Jersey | 6 | 3 | 1 | 5 | 1 | 1 | 2 | 2 | 4 | 6 | 4 | 1 | 36 |
| New York | 6 | 8 | 6 | 10 | 6 | 9 | 5 | 9 | 6 | 9 | 9 | 8 | 91 |
| North Carolina | | 1 | | | | | | | 1 | | | | 2 |
| Ohio | 2 | 2 | 4 | 1 | 2 | 1 | 3 | | | 3 | 6 | 2 | 26 |
| Oregon | 1 | 1 | | | 1 | | | 1 | 5 | | | | 9 |
| Pennsylvania | 10 | 10 | 9 | 12 | 5 | 5 | 4 | 2 | 8 | 13 | 11 | 4 | 93 |
| Rhode Island | 1 | | 1 | | 2 | 1 | | 1 | 1 | 2 | | | 9 |
| Tennessee | | | | | 2 | | | 5 | | | | | 7 |
| Texas | 1 | | | | 1 | | | | | | | | 2 |
| Washington | 1 | | | 1 | | | | 2 | | | 1 | 2 | 7 |
| West Virginia | 1 | | | | | | | | | | 1 | | 2 |
| Wisconsin | | | | | | | | 1 | | 2 | | | 3 |
| United States | 43 | 41 | 29 | 42 | 44 | 27 | 28 | 33 | 37 | 57 | 54 | 43 | 478 |

## III

Section 3 of the proposed bill deals with so-called yellow dog contracts.[40] It provides that any promise by an employee or an employer not to become or remain a member of a union or of an employers' organization, respectively, during the existence of the employment relationship:

> "is hereby declared to be contrary to the public policy of the United States, shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States."

To give a detailed history of the uses to which "yellow dog contracts" have been put and to trace their effect upon industrial relations, would be to retraverse now familiar ground. Incontestably these agreements are the offspring of unequal economic position. The worker is not in a position to withhold free assent and therefore does not give it freely, if freedom means more than signing a piece of paper. Labor unions, we were told by the late Chief Justice, "were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. . . . Union was essential to give laborers opportunity to deal on equality with their employer."[41] These agreements are a plain denial of the right of association if this right, so freely avowed in the abstract, is to have meaning in the daily lives of workers.

Nevertheless, the Supreme Court and in its wake, of course, the inferior federal courts, have made such agreements the basis for drastic decrees whereby employers are rendered immune against attempts at unionization.[42] If employees have not bound themselves to abstain from union membership, the employer cannot invoke the law against the persuasions of the union to win new members.[43] What a barren right, that may be defeated by an agreement that is extorted by economic compulsion and leaves the worker only the option of exchanging his employment for another which imposes no restrictions upon him—an option unavailable in most instances through the hard necessities of life! ". . . the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks . . ."[44] is too neatly avoided by the simple expedient of requiring employees to promise not to join a union. This offends the sense of fairness of the man-in-the-street. The law must not be asked to be a pioneer in ethics, but it ought not lag behind the common feelings of justice. The New York Court of Appeals[45] has rejected such palpable trickery with law. However much Senators justified the binding character of authority upon Judge Parker in his *Red Jacket* opinion, not a single Senator was willing to support the social justification of these agreements or the legal consequences they entail, with the exception of Senator Hastings of Delaware, who invoked the convenient doctrine that majority opinions are always right.[46]

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[40] Section 3 reads: "Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States, including specifically the following:

"Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

"(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

"(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization."

[41] Amer. Steel Foundries v. Tri-City Council, 257 U. S. 184, 209, 42 Sup. Ct. 72, 78 (1921).

[42] THE LABOR INJUNCTION, at 39, n. 176. For an excellent recent discussion see E. E. Witte, *"Yellow Dog" Contracts* (1930) 6 WIS. L. REV. 21.

The Majority Report does not challenge the verdict of experience upon the "yellow dog contracts" nor give them social justification. It finds itself imprisoned by authority:

> "However distasteful such contracts may be to us, yet the fact remains that the Supreme Court in three cases has held that there is no legislative power, State or Federal, to inhibit or outlaw employment contracts providing against union membership."[47]

"Yellow dog contracts," the report argues in substance, are forever safely sheltered, so far as Congress is concerned, behind the Fifth Amendment.

Three Supreme Court decisions are cited as though they were adamantine obstructions against the power of Congress to control the power of "yellow dog contracts," "however distasteful" they may be. One of these decisions, the *Hitchman* case,[48] obviously raises no constitutional barrier. It is merely an expression of the Supreme Court's view of the common law. In the solution of no problems is the common law, *i.e.*, judicial exposition of policy, less the measure of constitutional power to legislate than in those presented by industrial conflicts. On the "common law" of these "yellow dog" arrangements, the New York Court of Appeals holds views contrary to those of the Supreme Court:

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[43] Amer. Foundries v. Tri-City Council, *supra* note 41.

[44] *Ibid.*, at 203, 42 Sup. Ct. at 76.

[45] Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863 (1928); Interborough Rapid Transit Co. v. Green, 131 Misc. 682, 227 N. Y. Supp. 258 (Sup. Ct. 1928).

[46] 72 CONG. REC. 8029:

"MR. BORAH: What does the Senator do with Justice Hughes's opinion that it was invalid? Does he agree with that?" [The reference is to Mr. Justice (now Chief Justice) Hughes's dissent in Coppage v. Kansas 236 U. S. 1, 35 Sup. Ct. 240 (1915).]

"MR. HASTINGS: I never agree with the dissenting opinion of any court. I learned long ago that the majority opinion of every court was controlling, and that it is not worth while to bother with what somebody said in a dissenting opinion. I learned that before I got very far in the practice of the law, and it still holds good."

[47] *Supra* note 14, at 6.

> "Though the plaintiff's employees are prohibited by the plaintiff from joining that association or union, the union may, despite the prohibition, attempt to recruit its membership from those employees, at least where the prohibition is not part of a contract of employment for a definite term."[49]

To suggest that Congress might not choose between alternative conceptions of the common law on a novel and mooted point makes of the Constitution something petty and partisan, and denies as well the dynamic vitality of the common law itself.

The other two reliances of the Majority Report are the familiar *Adair v. United States*[50] and *Coppage v. Kansas*.[51] These dealt with enactments—the first, invalidating under the Fifth Amendment the legislation drawn by Attorney General Richard Olney which made it a crime to discharge an employee because of his membership in a labor union;[52] the second, invalidating under the Fourteenth Amendment state legislation which made it a crime to require an employee to agree, as a condition of employment, not to become or remain a member of a labor union. The bill now challenged, however, is a very different measure. It does not legislate these contracts into crimes, but merely withdraws the support of the federal courts for their enforcement. To send a man to jail for an arrangement is one thing; to deny the aid of a court for its enforcement quite another. Our law is very familiar with this distinction. Behind it is the experience of centuries in a most important field of English law, to wit, the regulation of contracts in restraint of trade. That law has consistently recognized the vital difference between penalization of conduct, and allowing it without lending the law's aid, upon default, in the coercion of such conduct. Lord Bowen summarized this chapter of English legal history:

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[48] *Supra* note 31.

[49] Interborough Rapid Transit Co. v. Lavin, *supra* note 45, at 79, 159 N. E. at 868. See also La France Co. v. Elec. Workers, 108 Ohio St. 61, 140 N. E. 899 (1923).

[50] 208 U. S. 161, 28 Sup. Ct. 277 (1908).

[51] 236 U. S. 1, 35 Sup. Ct. 240 (1915).

[52] For discussion and criticism of these cases, see THE LABOR INJUNCTION, at 146-152.

> "Lastly, we are asked to hold the defendants' Conference or association illegal, as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognise their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public."[53]

In sum, the constitutional right, recognized by the Supreme Court, not to be committed to jail for making a particular agreement does not carry with it a constitutional right to all resources of the law to enforce such an agreement.

Our constitutional law is accustomed to draw lines far more tenuous than to differentiate between a right not to be committed to jail for making an agreement and the right to all the law's weapons in support of such an agreement. This is precisely the line which the New York Court of Appeals has drawn. In *People v. Marcus*,[54] that Court anticipated the Supreme Court in denying the legislative power to penalize an employer for exacting a worker's promise not to join a union. But this ruling has not been deemed inconsistent with the Court's more recent conclusion that "the union may, despite the prohibition, attempt to recruit its membership from those employees."[55] This is merely the law's acknowledgment that an arrangement which the law will not help enforce, but will not penalize, matters in men's relations. The law's abstractions recognize a difference which men feel. The making of the agreement is left to the free willing of the parties; the sanction for this performance is reduced to the psychologic compulsion[56] that generally secures obedience to an agreement that is well founded in the ethical standards of the community. The *Adair* and *Coppage* cases in no wise bar acceptance of a view which is consistent with the experience both of life and of law.

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[53] Mogul Steamship Co., Ltd., v. McGregor, Gow & Co., L. R. 23 Q. B. Div. 598, *aff'd* by House of Lords, [1892] A. C. 25.

[54] 185 N. Y. 257, 77 N. E. 1073 (1906).

[55] See *supra* note 49.

[56] See Cochrane, *Why Organized Labor is Fighting "Yellow Dog" Contracts* (1925) 15 Am. Lab. Leg. Rev. 227-8: "There is, however, undoubtedly, a psychological effect upon some employees, particularly the ignorant or illiterate worker, when he affixes his signature or his mark to a written agreement. He doesn't know what may not happen if he even incurs the displeasure of his employer. To him it might involve not only his being fired, but he might also be punished—perhaps fined and imprisoned; and when there is included in the individual contract a clause whereby the employee promises to have no dealings or talks with any one in regard to union matters, the employer, playing upon the fears and apprehensions of the ignorant man, finds that such contracts assist, perhaps to a very marked degree, in not only keeping the union out, but keeping the union at a distance. . . . There is, also, an effect upon intelligent trade-union officials, for when they are notified by a firm's attorney that an effort is being made to organize employees who have signed individual contracts, the trade-union official cannot escape having in mind the possibility of involved and costly court costs."

To be sure, some assumptions in these cases may call for reexamination. But constitutional adjudication is to no small degree a refining of large assumptions and a tightening of loose language in earlier cases. The essential elenchus that most consistently governs the cases under the due process clauses is the exercise of "judgment from experience as against a judgment from speculation."[57] What is due process of law "cannot be settled by invoking decisions of this Court made years ago based upon conditions radically different from those which prevail today. The problem is one to be tested primarily by present day conditions."[58]

It bespeaks little respect for the Supreme Court to deem it insensitive to knowledge of "present day conditions," or unresponsive to the significance of such knowledge in the application of the general precepts of fair dealing which underlie the conception of "due process." At the last term, the Court, through the Chief Justice, again illustrated the ample powers of government to accommodate themselves, within the Constitution, to the evolving need of our industrial society:

> "There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded.
>
> ". . . Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures.
>
> ". . . As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections [of representatives], they cannot complain of the statute on constitutional grounds."[59]

Only logomachy, not constitutional law, would conclude that legislation which responds to the dictates of experience and conforms to industrial reality by nullifying such interferences[60] is an "arbitrary or capricious exercise" of legislative power.[61]

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[57] Tanner v. Little, 240 U. S. 369, 386, 36 Sup. Ct. 379 (1916).

[58] United Railways v. West, 280 U. S. 234, 249, 50 Sup. Ct. 123 (1930). See People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915).

[59] Texas & N. O. R. Co. v. Ry. Clerks, 281 U S. 548, 569, 570-1, 50 Sup. Ct. 427 (1930). An interesting recent article, Berman, *Supreme Court and Railway Labor Act* (1930) 20 Am. Ec. Rev. 619, maintains that this case, in essentials, conflicts with Adair v. United States, in that the Court sustained an injunction which prevented a carrier from discharging active union leaders among its employees and compelled it to re-employ those already discharged. And see Note (1930) 40 Yale L. J. 92.

If, then, the legislation under consideration did purport to invalidate "yellow dog contracts," the Supreme Court is not bound by prior decisions to find a bar in the Fifth Amendment. But the validity of the proposed section does not even entail these wider issues. "Yellow dog contracts" are not invalidated; they are only rendered unenforceable in the federal courts. The exact words are: "shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States. . . ." Whatever relief may be available in the state courts is open; merely the federal courts must decline to enforce these agreements. Such a restriction of the ambit of the jurisdiction of the inferior courts denies to no litigant a constitutional right:

> "The right of a litigant to maintain an action in a federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right *granted* by the Constitution. . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right."[62]

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[60] Wisconsin has enacted legislation practically identical with that here proposed. Wis. Laws 1929, c. 123. For other examples of similar state legislation, see THE LABOR INJUNCTION, at 149-150.

The Massachusetts House of Representatives requested the opinion of the Supreme Judicial Court upon the constitutionality of such a measure. The Court was of the opinion that the proposal would be in conflict with the United States and Massachusetts constitutions. *In re* Opinion of the Justices, 171 N. E. 234 (Mass. 1930). This opinion, however, relied wholly upon Supreme Court decisions with respect to criminal statutes. Further, it did not have the benefit of Texas & N. O. R. Co. v. Ry. Clerks, *supra* note 59, decided subsequently. The Massachusetts opinion has been criticized. Note (1930) 25 ILL. L. REV. 307; (1930) 44 HARV. L. REV. 293.

[61] The point has been made that since this section denies all remedies, any consideration of its constitutionality must deal with Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921), which invalidated a statute precisely on the ground that it denied all remedies. This argument loses its force when it is recalled that Chief Justice Taft dealt in the Truax case, with the converse of the very question. The contention was made that since the Supreme Court had in prior cases *approved* statutes regulating, changing, and nullifying the rights and remedies of employees and employers as against each other, it should also approve the nullification of the employers' remedies against tortious and criminal acts of their former employees. Chief Justice Taft replied: "The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement" (at 329).

[62] Kline v. Burke Constr. Co., 260 U. S. 226, 233-4, 43 Sup. Ct. 79 (1922).

To this, the Committee Report answers that while it is proposed to render these contracts unenforceable only in the federal courts, the right of removal, open to defendants in case of diversity of citizenship, would, in such cases, withdraw from these contracts all remedy:

> "Being legal such contracts are enforceable in the State courts. In a large number of cases, however, litigation with regard to such contracts would involve diversity of citizenship or a Federal question. Diversity of citizenship or a Federal question being present, under existing Federal law (sec. 28 of the Judicial Code), it is within the power of the defendant at his own option to remove the case to the Federal courts. The substitute does not deprive the Federal courts of this jurisdiction by removal. It leaves it within the power of the defendants at any time to prevent the State courts from enforcing their law as to the legality of such contracts, through removal of the case by the defendant to the Federal courts. Thereupon the Federal courts are required to assume jurisdiction of the case; but despite such courts having jurisdiction of the case, the substitute nevertheless makes the contract unenforceable in such courts and deprives the plaintiff of all remedies at law or in equity in such courts. The contract is legal and yet it is in practical effect beyond the power of the plaintiff to obtain relief thereunder."[63]

But the dominant intent of this provision, as of the whole bill, is only to restrict federal jurisdiction. Federal courts are not to be used as instruments for effectuating such agreements. Therefore, an effort by a defendant to remove a case resting upon such a contract from state to federal court will be without avail. If the federal court has been denied jurisdiction over a cause of that character, no removal is permitted, because there is no court to which to remove.[64] But if the language of the bill justifies the Committee's fears regarding removal, it should not be difficult to find a formula that would put the matter beyond doubt and not add a new instance of nullifying state policy by the device of removal. Wherever state law gives a wider range of relief than the federal law, removal in cases of diverse-citizenship ought to be abolished.[65]

## IV

Sections 4 and 5 of the bill deal with other aspects of the contraction of equity jurisdiction in labor disputes. What is intended will appear more clearly from a comparison of the relevant extracts of Section 20[66] of the Clayton Act with the modifications now proposed:

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[63] *Supra* note 14, at 7.

[64] § 28 of the Judicial Code, to the effect that a removal suit generally must be one "of which the district courts of the United States are given original jurisdiction by this title," continues a limitation first introduced in the Removal Act of 1887, 34 STAT. 552, § 2. See Tennessee v. Union & Planters' Bank, 152 U. S. 454, 458, 464, 14 Sup. Ct. 654 (1894); General Ins. Co. v. Lake Shore Ry., 260 U. S. 261, 276-279, 43 Sup. Ct. 230 (1922).

[65] See THE LABOR INJUNCTION, at 213, n. 26.

| *Clayton Act* | *Proposed Bill* |
|---|---|
| "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, . . .<br>"And no such restraining order or injunction shall prohibit any person or persons. . . ." | "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in cases involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute, (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts. . . ." |

The Clayton Act, it will be noted, begins with outright abolition of the injunction in a defined class of cases. But the abolition is forthwith qualified—"unless necessary to prevent irreparable injury to property, or to a property right." The absence of a similar qualifying phrase in the substitute provision arouses the Committee's concern:

> "Further, this denial of a remedy in equity applies even though there is no adequate remedy at law, and even though a strike may result in irreparable injury to property or to a property right. That this is the proper interpretation of the sections need not be a matter of doubt, for Section 20 of the Clayton Act in almost identical language now prohibits issuance of injunctions in all strikes excepting cases in which the injunction is necessary to prevent irreparable injury to property or to a property right for which injury there would be no adequate remedy at law. Sections 4 and 5 carefully omit this exception."[67]

Surely the Committee is needlessly alarmed. The new bill contains no language abolishing the injunction; there is no occasion, therefore, for an appropriate saving clause. So far as this issue is concerned, the two modes of legislative drafting accomplish the same result. The Clayton Act begins by abolishing injunctions in labor disputes, then creates an exception and qualifies that exception. The proposed statute does not abolish the injunction, but limits the scope of its operation.

This brings us to the major attack of the Committee. The Report condemns the substitute provisions on the assumption that they "confer an absolute right to strike," and erase all distinction between legal and illegal strikes.[68] It is difficult to deal with an objection that proceeds from a neglect and a disregard of the history of labor litigation in the federal courts prior and subsequent to the passage of the Clayton Act. Like all legislation that is but one chapter in a sequence of enactments, Section 4 must be read in the context of the history that begot the Clayton Act and of the decisions that so largely sterilized that Act.

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[66] 29 U. S. C. § 52 (1926).

[67] *Supra* note 14, at 8.

The irritants that culminated in the passage of Section 20 of the Clayton Act were well defined long before 1914. The right of labor to organize, conceded in the abstract, was denied in the concrete mainly through use of the injunction—a use which such a conservative statesman as William H. Taft found abused. In form, the labor injunction was vague and of imperilling ambiguity; in content it subjected the most conventional trade union activities to the dangers of contempt; in result, it sometimes paralyzed the exercise of unquestioned right and sometimes incited men to violence, but uniformly it bred in masses of our people hostility to the federal courts and undermined confidence in the administration of law as even-handed justice.[69] To remove these abuses was the intention behind the Clayton Act. Its intended correctives were expressed as limitations upon the content of injunctions.[70] The immunities which it provided were to be available in "any case between an employer and employee . . . involving or growing out of, a dispute concerning terms or conditions of employment. . . ."

The fate of this provision in the courts is well known.[71] The words "any case between an employer and employee . . . involving or growing out of, a dispute concerning terms or conditions of employment . . ."

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[68] *Ibid.*

[69] See THE LABOR INJUNCTION, c. 2, 3.

[70] "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." (Oct. 15, 1914, c. 323, § 20, 38 STAT. 738.) All of these provisions were subsequently held to be "merely declaratory of what was the best practice always." Amer. Foundries v. Tri-City Council, 257 U. S. 184, 203, 42 Sup. Ct. 72, 76 (1921).

[71] See THE LABOR INJUNCTION, c. 4.

was construed to mean that the shelter of the Clayton Act was not available when

> (a) a union sought recruits through organizers who were neither employees nor former employees of the complainant;[72]
>
> (b) union organizers sought recruits among employees who had agreed not to join a union;[73]
>
> (c) a union resorted to strikes in an industry which used labor on materials destined for or brought by interstate commerce;[74]
>
> (d) an industrial dispute concerned union recognition, rather than the immediate terms of employment;[75]
>
> (e) union activity was directed by defendants not against their immediate employer, but against other employers whose non-union standards, because in the same craft or in a related craft of the same industry, were endangering established union standards.[76]

The gloss thus written on the Clayton Act by the courts left substantially intact the grievances against the labor injunction prior to 1914. The words of limitation with which the Clayton Act sought to confine the injunction were nullified by the words of limitation with which the courts confined the Clayton Act. "Restraint of trade," "conspiracy," "burden on interstate commerce" continued the convenient pigeon-holes for restrictions upon labor activities by the use of decrees which the Clayton Act was intended to restrict. With increasing feeling the inquiry continued to be pressed—of what avail is a right to co-operative endeavor when every effective exercise of that right encounters judicial interdict? Its answer calls for something more than the rhetoric of abstractions. The creation of rights is the business of legislatures; so also is the task of defining with particularity the area within which rights may be exercised.

Such are the basic assumptions of the new bill defining the scope of authority of the federal courts in issuing labor injunctions. Putting judgment of policy to one side, it certainly belongs to the constitutional competence of Congress[77] to mark with precision the allowable area of social and economic conduct open to trade unions, free from the menace of injunctions. Accordingly, the pending measure makes explicit the conception of the rôle of unionism in our competitive industrial system, not the less appropriate for Congressional definition because as theory merely a reflex of avowed judicial doctrine. It derives from the premise that workmen must be free to combine. Consequently, the power of economic pressure is allowed to be exerted not only to achieve such immediate goods as American standards of wages and working conditions, but also to foster the unity and power of an organization and to "win converts to its fold"[78] from the ranks of labor in the same craft or from the interrelated occupations in the same industry. All this merely reflects a belief widely entertained by economists as well as by workers, and frequently acted upon by employers themselves, that the workmen engaged in every division of a single industry are bound by a common economic bond. In the long run, and not too long, they share like burdens and fortunes.

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[72] THE LABOR INJUNCTION, at 174, n. 160; Armstrong v. United States, 18 F.(2d) 371 (C. C. A. 7th, 1927); United States Gypsum Co. v. Heslop, 39 F.(2d) 228 (N. D. Iowa 1930).

[73] THE LABOR INJUNCTION, at 174, n. 163.

[74] Alco-Zander Co. v. Amalgamated Clothing Workers, *supra* note 24; United States v. Painters' District Council, *supra* note 25.

[75] *Supra* note 74; see also Columbus Heating and Ventilating Co. v. Pittsburgh Bldg. Trades Council, 17 F.(2d) 806 (W. D. Pa. 1927); United States Gypsum Co. v. Heslop, *supra* note 72.

[76] Duplex Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921); Bedford Co. v. Stone Cutters Ass'n, *supra* note 27. And see Vaughan v. Kansas City Moving Picture Operators' Union, 36 F.(2d) 78 (W. D. Mo. 1929), where, according to the court's statement of the facts, the employer was not allowed an opportunity to discuss the contract submitted, but was told by the union to sign "or else." The court held that this did not constitute such a "dispute" between employer and employees as would bring the case under the Clayton Act. The term "dispute," so the court held, means a *verbal controversy*. An injunction was issued.

Such is the conception behind the substitute bill; and this the manner of its realization. The immunities from injunction provided in Section 4[79] are defined in language radically different from that used in the Clayton Act. They apply to "cases involving or growing out of any labor dispute" and to persons "participating or interested in such dispute." The judicial application of these general terms is guided by explicitness of definition.[80] "A case involving or growing out of any labor dispute" means a case involving persons who are engaged in the same industry, trade, craft, or occupation; "persons participating or interested in such dispute" are persons against whom injunctive relief is sought and who are engaged in the industry, trade, craft, or occupation in which the dispute occurred; a labor dispute includes

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[77] See THE LABOR INJUNCTION, c. 4. "The power to determine what the policy of the law shall be rests with the Legislature within Constitutional limitations, and when it has expressed its will and established a new policy, courts are required to give effect to such policy." Straus & Co. v. Canadian Pacific Ry. Co., 254 N. Y. 407, 413-414 (1930). See also South and Central American Commercial Co., Inc. v. Panama R. Co., 237 N. Y. 287, 291, 142 N. E. 666 (1923).

[78] Nann v. Lasar Raimist, etc., 255 N. Y. 307, 319 (1931).

[79] "(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in § 3 of this Act;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute any strike or unemployment benefits or insurance or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in § 3 of this Act."

> "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Both the text and the intent behind the text make evident that the committee has misconceived the scope of the substitute bill. It confers not "an absolute right to strike," only a limited right. The immunity against injunctions goes to the limit of substantial economic community of interest. There it terminates. The interests beyond are too remotely material to warrant the same breadth of legal privilege. The bounds thus marked are not arbitrary. They are the practical implications of rights which the Supreme Court has conceded in the abstract; they derive from a series of mature deliberations, in which the foremost state court of the country has been called upon to adapt legal rules to industrial needs.[81]

If, then, the bill is judged by its terms and in the context of the industrial situation, the fictitious issues both of constitutional law and policy urged by the Committee become irrelevant. But in matters where passion so readily gives rise to confusion of legal issues, it may not be superfluous to make specific answer to constitutional objections put by the Committee in the form of three rhetorical questions.

1. ***Is the power to issue injunctions an inherent part of the judicial power of which the Federal courts cannot be deprived?*** Surely not. The

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The cataloguing of specific acts that may not be enjoined differs in detail from § 20 of the Clayton Act. But these differences are not put in issue by the Committee Report. The issue is joined only on the policy of widening the class to which the immunities are made available.

[80] § 13 of the substitute Shipstead Bill.

[81] For a recent statement of the law of New York by a federal court, see Aeolian Co. v. Fischer, *supra* note 23.

restriction of the injunctive remedy in specific cases has the sanction of history. The founders of the government provided that

> ". . . nor shall a writ of injunction be granted to stay proceedings in any court of a state."[82]

For more than a century this has been a limitation upon the federal courts, but the Supreme Court has never intimated the slightest doubt as to its constitutional validity.[83] Similarly, since 1867, it has been the law of the land that

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."[84]

And never has this limitation upon the federal courts been suspect of constitutional frailty.[85]

2. *Is the denial of all adequate judicial remedies in case of an illegal strike a denial of due process of law?* This question is not pertinent, for the bill only withdraws the remedy of injunction. Civil action for damages and criminal prosecution remain available instruments. Illegal strikes are not made legal. The question misrepresents the significance of the *Truax* case. The opinion of Chief Justice Taft leaves no doubt that the majority of the Court assumed it was dealing with a statute that made the conduct in question lawful:

> "A law which operates to make *lawful* such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the Fourteenth Amendment.
>
> "The opinion of the State Supreme Court in this case if taken alone seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful."[86]

Certainly the *Truax* case did not maintain that withdrawal of injunctive relief alone denied due process of law. In so far as it found an invasion of the guarantee by the Fourteenth Amendment of equal protection of the laws, the Court will hardly derive such an objection from the Fifth Amendment, alone applicable to federal legislation, which contains no such guarantee of equal protection of the laws.[87]

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[82] Act of March 2, 1793, c. 22, § 5, 1 STAT. 334, REV. STAT. § 720 (1878), 36 STAT. 1162, 28 U. S. C. 379 (1926).

[83] Smith v. Apple, 264 U. S. 274, 44 Sup. Ct. 311 (1924); Woodmen of the World v. O'Neill, 266 U. S. 292, 45 Sup. Ct. 49 (1924). See Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 345. And see also § 266 of the Judicial Code.

[84] REV. STAT. § 3224 (1867); 26 U. S. C. § 154 (1926).

[85] Graham v. du Pont, 262 U. S. 234, 43 Sup. Ct. 567 (1923). Constitutionality sustained in Pullan v. Kinsinger, Fed. Cas. No. 11463 (C. C. S. D. Ohio 1870) and not questioned since. See Standard Nut Margarine Co. v. Rose, 41 F.(2d) 385 (N. D. Ga. 1930), where the court said, concerning this provision: "'Shall the thing formed say to him that formed it, Why hast thou made me thus?' . . . when power is withheld, the District Court cannot exercise it no matter what private wrong may result" (at 386).

[86] 257 U. S. at 328, 42 Sup. Ct. at 128. (Italics ours.)

3. ***Is what in effect amounts to legalization of strikes that are now illegal under the state law an infringement upon the legislative power preserved to the states?*** This again poses what is not in issue. The bill is not in effect a "legalization of strikes that are now illegal under state law." It is a regulation of equity practice in federal courts, a practice indisputably within the province of Congress to regulate.[88] State law is untouched and remains what it is. If the federal courts will thereby enforce in diversity cases different law from that which state courts apply, it is what federal courts do today in diversity cases, and that, too, not because of any congressional action, but through the judiciary's own power of law-making.[89]

## V

Finally, a number of changes proposed in equity procedure require mention. The proposals in the bill are all responsive to felt needs revealed by rulings under existing practice, but the Committee deals with them *in vacuo*. Concerning the time limit of the *ex parte* restraining order,[90] concerning the proof that must condition the granting of such an order,[91] concerning the procedure and proof on the hearing for a preliminary injunction,[92] the Committee is wholly unmindful of experience:

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[87] 257 U. S. at 340, 42 Sup. Ct. at 132.

[88] See THE LABOR INJUNCTION, at 208 *et seq.*

[89] See B. & W. Taxi Co. v. B. & Y. Taxi Co., *supra* note 21.

[90] § 7 e: "Such a temporary restraining order shall be effective for no longer than five days, and shall become void at the expiration of said five days."

[91] § 7 e: "Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice."

[92] § 7: "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been committed and will be continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted

> ". . . it is difficult to see why the matter should not be left to the discretion of the court with a view to the particular circumstances."[93]

What cavalier disregard of a half century's history! The Committee seems strangely unaware that the distrust and resentment which have made the labor injunction so long an issue in American politics have been engendered in large part by the way in which judicial discretion has been exercised.[94] The whole fate of an industrial controversy may depend upon which side is the beneficiary of judicial discretion more than upon which side is acting according to law.[95] The slant with which one reads the evidence will determine what the "facts" are—and the unconsciousness of the slant in most cases makes its operation more decisive.[96] Procedure thus becomes a crucial factor in labor litiga-

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upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

[93] *Supra* note 14, at 11.

[94] See, for the most recent investigations, *Report of Federal Council of Churches on the Use of the Injunction in Labor Disputes* (March, 1930); *Report of Commission on Industrial Inquiry, The National Civic Federation* (1931). Sir W. A. Jowitt, the Attorney General, said in the recent debate in the House of Commons on the second reading of a bill to amend the Trade Disputes Act of 1927: " . . . broadly speaking, the political genius of our people has evolved this system—that we have not sought to make strikes illegal, but we have sought to control, and rigorously control, what was done during the strike. The American policy has been exactly the opposite. The Americans have sought to make strikes illegal, and it is an interesting reflection to the student of comparative history that just at the time when we are abandoning our old policy and having recourse to the American policy—that is the very time when the Americans are abandoning their policy and adopting ours.

"I think it is worth while to see why it is that the American policy has failed. An injunction restraining a strike or restraining the use of funds, if it is to be of the smallest use, must be granted with great promptitude. It must be granted either before the strike takes place or in the very early stages of the strike. Obviously, there is no time for delay at all. Difficult enough though it may be for a judge to ascertain the truth after an elaborate trial, after the cross-examination and confrontation of witnesses and all the elaborate machinery of a trial, it is almost impossible to ask any man to get at the truth on affidavits which are placed before him during the heat and bitterness of a labour controversy. That is why successive Presidents in the United States called attention to the fact—for it is quite untrue to make the smallest attack on the judges in this connection—that this system would not work." HANS. DEB. (Commons) Vol. 247, No. 42, 392-393 (January 22, 1931).

[95] See THE LABOR INJUNCTION, c. 2.

[96] The psychologic difficulty of escaping the play of unconscious forces in matters vitally touching contemporary economic and social issues has been penetratingly put by Lord Justice Scrutton: ". . . the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate a judgment as you would wish. This is one of the great difficulties at present with Labour. Labour says: 'Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?' It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class." Scrutton, *The Work of the Commercial Courts* (1921) 1 CAMB. L. J. 6, 8.

tion. In fairness to the litigants, the prepossessions of a particular judge, however disinterested, should not be allowed opportunity to determine the operation of that procedure. It will promote confidence in law in one of its most sensitive areas, to relieve a judge of the impossible task of isolating his prepossessions from his judicial temper. In controversies of this class, only the most biased judges disavow the total absence of bias.

A concluding statement in the Majority Report[97] deserves comment because of the currency of the argument which it embodies:

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[97] Several matters are too minor for consideration in the text.

§6 of the Bill provides: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

It is attacked in the Report on the ground that it "attempts fundamentally to change the law of agency." That, on the contrary, this merely states the normal rule of law as to liability of a principal for the wilful or malicious acts of his agent, see MECHEM, AGENCY (2d ed. 1914) §§ 1926-82.

Presumptions of guilt and easy inferences in labor cases have led to responsibility by unions and their officers for unlawful conduct done by any one at all. Three facts make this unjust (aside from the very obvious fact that it is a discriminatory result unique to labor disputes): (1) the common practice of employing industrial spies and private detectives who do violence and provoke violence, thereby creating the occasion for enlisting the aid of the law; (2) the impossibility of completely controlling the conduct of all members of the union, none of whom are employees or agents of the union and some of whom are bound to be irresponsible; (3) the crucial fact as to whether an act of an agent is done within the course and scope of the employment is normally a jury question; in injunction cases the fact is found by the court.

§7 (c) requiring as a condition to injunctive relief that the court find "as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon the defendants by the granting of relief," is intended as a restatement in statutory form of a principle taken bodily from the cases, *i.e.*, that the availability of equitable relief depends upon a balance of the injuries involved. McCann v. Chasm Power Co., 211 N. Y. 301, 105 N. E. 416 (1914). See cases collected in CHAFEE, CASES ON EQUITABLE RELIEF AGAINST TORTS (1924) c. IV.

§8 withholding injunctive relief from any complainant who has failed to avail himself of every peaceful means of settling the dispute is an application of the equity maxim—"He who comes into equity must come with clean hands." See David Adler & Sons Co. v. Maglio, 200 Wis. 153, 158, 228 N. W. 123, 125 (1929), where the court said: "Plaintiff pursued a course of conduct that precipitated a labor war. When the tide of battle seemed to be setting against it, the plaintiff sought to withdraw from the field to which it had deliberately gone and appealed to a court of equity for protection from the consequences that naturally flowed from the course of conduct which it had deliberately pursued.

"A court of conscience will not extend its strong arm to protect one who has pursued such a course of conduct. It will leave such applicant for relief where it has deliberately chosen to place itself." And *cf.* Cornellier v. Haverhill Shoe Mfrs. Assoc., 221 Mass. 554, 109 N. E. 643 (1915). See cases collected in (1911) 31 L. R. A. (N.S.) 881; (1912) 39 L. R. A. (N.S.) 580; L. R. A. 1916 C. 1269.

§11 provides for jury trial in all cases of "indirect criminal contempt." Reference is made in THE LABOR INJUNCTION, at 56-59, 189-197.

> "Furthermore, there are many situations in which the even-handed justice of the courts is preferable to executive attempts at law enforcement."[98]

An admirable sentiment, but perverted in application to the history of the labor injunction! When a crime is formally charged, the accused is protected by safeguards which summarize experience. But if the charge is contempt of court, the judge, himself the accuser, determines guilt or innocence, and for all practical purposes a conviction is not reviewable.[99] Contempt proceedings, in these industrial controversies, partake more of "executive attempts at law enforcement" than of "even-handed justice." And as for the *Debs* case,[100] which the Committee invokes—what dispassionate student of American society really believes that that case, in its sequelae, has made for peace in industry or enhanced confidence in the legal order?

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## APPENDIX

May 19, 1930

71st CONGRESS
2d Session

### S. 2497*

### In the Senate of the United States

A Bill to amend the Judicial Code and to definite and limit the jurisdiction of courts sitting in equity, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Sec. 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to

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[98] *Supra* note 14, at 12.
[99] See The Labor Injunction, at 59, n. 46.
[100] For a discussion of this case, see The Labor Injunction, c. 1.

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* Matter in brackets proposed to be omitted.

# CONGRESSIONAL POWER TO RESTRICT THE JURISDICTION OF THE LOWER FEDERAL COURTS AND THE PROBLEM OF SCHOOL BUSING

RONALD D. ROTUNDA*

Courts, Congress, and commentators often assert that article III of the Constitution and section 5 of the fourteenth amendment broadly empower Congress to restrict or eliminate the jurisdiction of the lower federal courts.[1] Recent congressional dissatisfaction with court-ordered busing as a means to achieve educational desegregation has raised anew the issue of the precise contours of this broad power.[2] Although the language of article III appears to give Congress wide discretion to fix the jurisdiction of the lower federal courts, constitutional limitations on that discretion may apply to attempts to control the judicial power to order school busing. Congressional use of section 5 of the fourteenth amendment to prohibit federal courts from considering busing as a tool to implement desegregation may be subject to additional restrictions. Before Congress prohibits court-ordered busing, these limitations should be examined closely.

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[1] *See, e.g.*, The Francis Wright, 105 U.S. 381, 386 (1881) (Congress may limit Supreme Court's appellate jurisdiction to revision of questions of law in admiralty); Sheldon v. Sill, 49 U.S. (8 How.) 440, 448 (1850) (statutes may divest federal court of jurisdiction over cases where diversity created by assignment of promissory note); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) (statute may bar plaintiff from maintaining action against customs official where payment made under protest).

There have been unsuccessful attempts in Congress to assert legislative power over the jurisdiction of the courts in order to control substantive results. *See, e.g.*, H.R. 11926, 88th Cong., 2d Sess. (1964) (bill to prevent federal courts from accepting jurisdiction in reapportionment cases); S. 2646, 85th Cong., 1st Sess. (1957) (bill to remove Supreme Court's appellate jurisdiction in matters relating to state laws regulating subversive activities and similar matters).

Commentators have also addressed the power of Congress to restrict lower federal court jurisdiction. *See, e.g.*, Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (Congress has power to determine how much article III power federal courts are authorized to exercise); Horwitz, Book Review, 85 HARV. L. REV. 1076, 1078-80 n.3 (1972) (Congress not required to create inferior federal courts). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 10 (1970); Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 118-34. *See also* R. BORK, THE CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS 6-8 (1972).

[2] Over the last few years various statutes aimed at federal courts' power to issue and enforce busing orders have been passed by one House of Congress or the other. *See, e.g.*, S. 3388 and H.R. 13916, 92d Cong. 2d Sess. (1972) (bills providing for stays of all court orders mandating busing of students not previously being bused); S. 3395 and H.R. 13915, 92d Cong., 2d Sess. (1972) (bills providing financial assistance to desegregating schools, subject to certain restrictions on time, distance, and number of students involved in busing). *See generally, Hearings on Proposed Amendments to the Constitution and Legislation Relating to Transportation and Assignment of Public School Pupils Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972) [hereinafter

This article will explore the limits, if any, on Congress' article III powers to control the jurisdiction of the lower federal courts and, in particular, the limits on restrictions of the courts' remedial power to order school busing. Although Congress may wholly abolish the lower federal courts' jurisdiction, its power is much more limited when only a very narrow, interstitial restriction is being placed on the courts' jurisdiction. Under the guise of a jurisdictional limitation, Congress may not restrict substantive rights that it could not directly affect. This test for the validity of any interstitial limitation on federal court jurisdiction is supported both by the principle of separation of powers implicit in article III and by the limitations on Congress' article III powers affected by other provisions of the Constitution, especially the due process clause of the fifth amendment.

The conclusion that Congress does not have unlimited power under article III to place interstitial restrictions on the jurisdiction of the federal courts is not changed by the broad scope of congressional

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cited as *Hearings on Proposed Amendments*]; *Hearings on H.R. 13915 Before the House Comm. on Educ. and Labor*, 92d Cong., 2d Sess. (1972). One comparatively weak bill was passed by both houses in 1974. Equal Educational Opportunities Act of 1974, §§ 213-59, 20 U.S.C. §§ 1712-58 (Supp. IV, 1974). The limitations of that Act may well be interpreted as inapplicable to busing orders that courts require to implement fourteenth amendment rights. *Cf.* Drummond v. Acree, 409 U.S. 1228, 1228-29 (1972) (Powell, Circuit Justice) (statutory postponement pending appeal of transportation orders to achieve racial balance not block of all desegregation orders).

Commentators have argued that such legislation, restricting courts' powers to order busing, may be authorized by section 5 of the fourteenth amendment and article III. *See, e.g.*, R. Bork, *supra* note 1, at 8-24; *Hearings on Proposed Amendments, supra* ser. 32, at 1631-32 (statement of Professor Charles Alan Wright); *cf.* J. Baron & C. Dienes, Constitutional Law Principles and Policy: Cases and Materials 44 (1975) (noting that such an argument may be made).

Richard Kleindienst, former acting Attorney General, relied on section 5 to support President Nixon's antibusing proposals: "With respect to establishing appropriate remedies and otherwise asserting its constitutional power over the federal courts Congress had ample authority. The Constitutional underpinnings for this power rest on both section 5 of the Fourteenth Amendment and those sections of articles I and III of the Constitution granting Congress certain powers over the Federal courts." *Hearings on Proposed Amendments, supra*, ser. 32, at 1139. One commentator has argued that section 5 gives Congress the power to restrict some substansive constitutional rights. *See* Cox, *The Role of Congress in Constitutional Determinations*, 40 U Cinn L. Rev. 199, 247-61 (1971). *But see* Goldberg, *The Administration's Anti-Bussing Proposals—Politics Makes Bad Law*, 67 Nw U.L. Rev. 339 (1972).

power under section 5 of the fourteenth amendment. The last part of the article argues that section 5 should only be read to increase congressional power over the states, not to grant Congress increased power vis-à-vis the lower federal courts. Congress, in short, may not restrict the courts' jurisdiction to order school busing on the grounds, for example, that the Congress is implementing and enforcing freedom of association.

## ARTICLE III JURISDICTION POWERS

Article III provides that "[t]he judicial Power of the United States shall be vested in . . . such inferior courts as the Congress may from time to time ordain and establish."[3] Building on this language, the Supreme Court has stated that:

> The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.[4]

Critics of court-ordered busing have seized on such dicta as giving support to the constitutionality of legislative action to curb the use of busing as a remedy for segregated public education. They argue that the power to abolish federal courts and to withhold or revoke their jurisdiction necessarily includes the power to deny or alter remedies.[5] Richard Kleindienst, testifying in favor of antibusing legislation as acting Attorney General, fairly summarized this view:

> From these express provisions [of the Constitution] flow a number of implied powers of Congress over the federal judiciary. Thus, the power to establish the lower federal courts includes the power to abolish those courts as, for example, Congress did with the Commerce Court in 1913.

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[3] U.S. CONST. art. III, § 1.

[4] Sheldon v. Sill, 49 U.S. (8 How.) 440, 448 (1850).

[5] *See Hearings on Proposed Amendments, supra* note 2, ser. 32, at 1141 (statement of acting Attorney General Richard Kleindienst). *See also* Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. PA. L. REV. 45, 47 (1975) (if Congress can literally abolish all lower federal courts, it must necessarily be able to limit their jurisdiction over particular subject matters).

> More significant is Congress' power to grant and to withdraw the jurisdiction of all federal courts, other than the original jurisdiction of the Supreme Court.
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> . . . .
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> It seems clear that if Congress has the power to create or abolish courts and to grant, withhold or revoke jurisdiction, it has the lesser power to grant or deny remedies to federal courts or . . . to minimally alter some of their equitable remedies.[6]

The busing critics' reliance on article III is misplaced. Even if Congress does have the power to refuse to create or, once created, to abolish all lower federal courts, that power does not imply absolute legislative control over judicial remedies. The grand debate over whether Congress must create lower federal courts and, once having created them, vest in them the full scope of the federal judicial power has a long history.[7] Resolution of this debate is not necessary to determine the limits on congressional authority to curtail only some aspects of the federal courts' jurisdiction; what must be examined is whether the power to abolish all lower federal courts necessarily implies the power to deny particular remedies.

The "lesser power" to carve out narrow exceptions to the lower federal courts' jurisdiction is really a greater power. The framers could justifiably leave Congress with the unrestricted discretion to determine whether to create any lower courts, for this power is a limited one; in exercising it, Congress would be forced to balance the advantages of having no lower federal courts with the disadvantages. An independent political check operates in such circumstances to assure that the congressional judgment will likely be a proper one.[8]

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[6] *Hearings on Proposed Amendments*, *supra* note 2, ser. 32, at 1142.

[7] *See generally* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Redish & Woods, *supra* note 5, at 52-75.

Justice Story, though admitting that the question whether Congress must establish inferior courts poses a question of some difficulty, still concluded in *Martin v. Hunter's Lessee* "that Congress are bound to create some inferior courts in which to vest all that jurisdiction which, under the Constitution, is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance." 14 U.S. (1 Wheat.) 304, 330-31 (1816) (emphasis added). *But see* White v. Fenner, 29 F. Cas. 1015 (No. 17,547) (C.C.D.R.I. 1818) (Story, J.) (diversity suit dismissal under statute limiting diversity jurisdiction).

More recently, Judge Prettyman held that if a case "arises under the Constitution, laws or treaties of the United States, . . . jurisdiction to entertain it is in some district court by compulsion of the Constitution itself." Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950).

[8] *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1397 (1953) (primary check on Congress is the political check).

This independent political check, not judicial review, operates to prevent Congress from abusing its discretion. Congressional enactment of a narrow, nonneutral, interstitial limitation of the lower courts' jurisdiction, however, may achieve what the Congress perceives to be practical benefits without the burdens; the independent political check will not operate effectively, and consequently there is a greater need for judicial review.

The Constitution can safely be read to grant Congress broad power to create or abolish the lower federal courts because practical considerations make it unlikely that Congress would have failed to create some lower courts or would ever attempt to abolish all lower courts. A government in the process of nation-building would find it difficult to rely entirely on state courts to enforce its laws:[9] the government would prefer that its laws be sympathetically interpreted by its own judges, and it would desire the greater likelihood of uniformity of decision that a system of lower federal courts would bring. State courts still would be available for the enforcement of federal laws,[10] but unless Congress provided broad appellate review in the Supreme Court, there would be 50 different and possibly inconsistent resolutions of federal issues. One of the most important roles of a national judiciary is its power to check the other two branches of government.[11] The limitation in *Tarble's Case*[12] on the ability of state courts to control a federal officer might obstruct attempts to force a recalcitrant executive branch to comply with congressional directives through state court proceedings.[13] The lower federal courts are also needed to increase the capacity of the federal judiciary and broaden its original jurisdiction since the Supreme Court has only limited original jurisdiction. A decision to grant Congress discretion to abolish entirely the jurisdiction of the lower federal courts was also appropriate in a Constitution intended to be an adaptable document. An independent political check would also operate on such a congressional determination: to attain any perceived advantages resulting from the abolition of the federal courts, Congress would also be forced to accept the disadvantages of relying on state courts. In fact, modern circumstances make it even more difficult to abolish the lower federal courts than it would have been to fail to create them.[14]

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[9] *See* Eisenberg, *supra* note 7, at 506 & n.50 (the new government would need its own judiciary to ensure proper implementation of its laws).

[10] *See* Testa v. Katt, 330 U.S. 386, 390-91, 394 (1947) (state courts have obligation to enforce Emergency Price Control Act, a federal statute); *cf.* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (congressional control over federal court jurisdiction is subject to fifth amendment due process requirements). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 434-38 (2d ed. 1973) [hereinafter cited as HART & WECHSLER] (congressional removal of state court jurisdiction over federal laws and abolition of federal courts would eliminate any judicial forum for assertion of constitutional rights and would raise serious due process problems); Redish & Woods, *supra* note 5, at 66 n.99.

[11] *See* Eisenberg, *supra* note 7, at 505 & n.38.

[12] 80 U.S. (13 Wall.) 397 (1871).

[13] *See id.* at 406-07. *See generally* Redish & Woods, *supra* note 5, at 93-108 (unavailability of state court remedy due to *Tarble's Case* makes availability of federal court remedy for constitutional rights mandatory). *Tarble's Case* held that a state court does not have jurisdiction to issue a writ of habeas corpus for discharge of a soldier from the United States military. 80 U.S. (13 Wall.) at 402. *Tarble's Case* would not be a serious obstacle to the elimination of the lower federal courts if the Court's decision was premised on the existence of lower courts or if it was based on comity and an interpretation of federal legislation dealing with the military. *See* HART & WECHSLER, *supra* note 10, at 427-28.

Congress does have power to limit and restrict the jurisdiction of federal courts,[15] but this power is not unlimited. The power to engage in interstitial withdrawal of federal courts' jurisdiction is subject to different concerns and different constitutional tests than is the power to abolish or refuse to create federal courts altogether. A congressional decision to deny federal courts' jurisdiction over cases brought by Irish plaintiffs, for example, would not be subject to the same pragmatic disadvantages that limit a decision to eliminate all lower federal courts. Nor would the independent political check be as effective where only a small segment of the population is affected. Constitutional limitations thus become essential to protecting the rights of such plaintiffs. The next section turns to the question of the constitutional scope of Congress' power to engage in such interstitial restrictions on lower federal court jurisdiction.

## LIMITATIONS IMPOSED ON THE INTERSTITIAL RESTRICTION OF ARTICLE III JURISDICTION BY THE PRINCIPLE OF SEPARATION OF POWERS

Whether Congress can restrict the power of the federal courts by sharply limiting their jurisdiction to hear cases raises a fundamental issue of the relationship between the federal legislature and the federal judiciary. In several early cases the Supreme Court indicated that Congress could not intrude on the Court's constitutional authority to decide cases under article III. More recently, Professor Henry Hart has argued forcefully that Congress may not constitutionally make exceptions to the jurisdiction of the Supreme Court that would destroy its essential role in the constitutional plan.[16] The rationale of Hart's thesis applies with full force to the lower federal courts since the basic intent of the framers to create an independent judiciary as a coordinate branch of government able to serve as a check on the other branches would be frustrated by any interstitial elimination of the lower federal courts' jurisdiction. Any attempt to prevent federal courts from ordering busing of school children as a remedy for educational segregation therefore meets several barriers.

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[14] *Cf.* Eisenberg, *supra* note 7, at 511-13 (increased caseloads make lower federal courts an essential component of the national judiciary; because Supreme Court can no longer review all cases within article III jurisdiction, lower courts are constitutionally required).

[15] *See* 28 U.S.C. § 1331 (1970) (jurisdiction restricted by requirements that amount in controversy exceed $10,000 and case involve federal question); *id.* § 1332 (jurisdiction restricted by requirement that amount in controversy exceed $10,000 and that diversity exist between parties); *id.* § 1346(a)(2) (jurisdiction of claims against the United States restricted by requirements regarding amount and nature of claim).

Pragmatic considerations also do not preclude limited restrictions on or selected elimination of courts. For example, in 1913, Congress abolished the Commerce Court which reviewed actions of the Interstate Commerce Commission. C. WRIGHT, *supra* note 1, § 5, at 12.

The Supreme Court first spoke directly on the proper relationship between the legislature and the judiciary in *Hayburn's Case*[17] in 1792, only three years after adoption of the Constitution and enactment of the Judiciary Act of 1789.[18] *Hayburn's Case* concerned a statute empowering federal and state courts to determine the propriety and amount of pensions for disabled veterans of the Revolutionary War.[19] The statute provided for the Secretary of War to review the court decision and transmit his opinion to Congress; if Congress agreed with the allowance and amount of the pension, it would appropriate the necessary funds.[20] The Circuit Court for the District of Pennsylvania refused to consider William Hayburn's application for a pension under the statute, and the Attorney General sought a writ of mandamus in the Supreme Court.[21] Prior to the decision, Congress avoided a constitutional confrontation by amending the legislation to provide other relief for the pensioners, and the Supreme Court dismissed on grounds of mootness.[22] In a footnote to the dismissal, however, the reporter noted some of the earliest thinking on the constitutional division between the legislative and judicial functions,[23] quoting Chief Justice Jay and Justice

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[16] Hart, *supra* note 8, at 1365. *See also* Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 172 (1960).

[17] 2 U.S. (2 Dall.) 408 (1792).

[18] *See generally* HART & WECHSLER, *supra* note 10, at 1-23, 32-36.

[19] *See* Act of March 23, 1792, ch. 11, 1 Stat. 243.

[20] *See id.*

[21] 2 U.S. (2 Dall.) at 408.

[22] *Id.* at 410 & n.(a).

[23] *Id.* at 410 n.(a) (quoting opinion of federal Circuit Court for the District of New York and letters of Circuit Court Justices to the President). Subsequent cases approved and relied on the decisions reported in the margin of *Hayburn's Case* as a correct interpretation of the Constitution. *See* Muskrat v. United States, 219 U.S. 346, 352-53 (1911); United States v. Ferreira, 54 U.S. (13 How.) 40, 49-51 (1851).

Cushing as Circuit Court Justices, holding that because the duties under the original Act were not judicial, they could not perform them in their capacity as judges. They agreed, however, to perform the duties as commissioners while court was adjourned.[24] The footnote in *Hayburn's Case* also cited letters to the President from two circuit courts concerning the same statute. In 1792 the Circuit Court for the District of Pennsylvania, consisting of Supreme Court Justices Wilson and Blair and a district judge, protested to the President that the statute was radically inconsistent with the independence of the judicial power that the Constitution vested in the courts.[25] The Circuit Court for the District of North Carolina, including Associate Justice Iredell, also had written the President that no decision of any court of the United States could be liable to revision or suspension by the legislature because the Congress had no judicial power but impeachment.[26] The five Justices were not speaking lightly; they were refusing, on constitutional grounds, to execute a statute according to Congress' terms over a decade before the Court decided *Marbury v. Madison.*[27]

Cases following *Hayburn's Case* further delineated the boundaries between the legislative and judicial functions. In *Gordon v. United States*[28] the Court held that it had no jurisdiction to hear an appeal from a Court of Claims decision regarding damage done to petitioner by United States troops during the War of 1812.[29] Although the Court did not provide the reasons for its holding, in a draft opinion Chief Justice Taney argued that the Court of Claims was not exercising a judicial function because it did not have the power to enforce its decisions, but was dependent on the Secretary of the Treasury and Congress to estimate and appropriate funds to pay its judgments.[30] The Chief Justice reasoned that the award of a remedy is an essential part of the exercise of judicial power and that rendering a judgment and yet having the remedy subject to

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[24] *See* 2 U.S. (2 Dall.) at 410-13 n.(a).

[25] *See id.*

[26] *Id.* It was not until a year after *Hayburn's Case* that the Supreme Court concluded, in an exchange of correspondence with President Washington, that the federal courts may not constitutionally give advisory opinions. *See* H. JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (1891).

[27] 5 U.S. (1 Cranch) 137 (1803).

[28] 69 U.S. (2 Wall.) 561 (1865); *see* Gordon v. United States, Appendix I, 117 U.S. 697 (1885).

[29] 69 U.S. (2 Wall.) at 561.

[30] Gordon v. United States, Appendix I, 117 U.S. 697, 698-99 (1885) (draft opinion of Taney, C.J., published posthumously).

Congressional approval is not an exercise of article III jurisdiction.[31] Lending support to this reasoning is *Schneiderman v. United States*,[32] in which a naturalized citizen contested a federal district court's de novo determination under section 15 of the Naturalization Act of 1906 that his grant of citizenship from a naturalization court was invalid.[33] Although the full Court did not reach the issue, Justice Rutledge commented in a concurring opinion that Congress does not have authority both to confer jurisdiction and to nullify the effects of its exercise by other jurisdictional provisions in the same statute.[34] The principle raised by Justice Rutledge reflects the constitutional independence of the judiciary and fosters the separation of powers doctrine implicit in article III. The full Court adopted this principle in *Chicago & Southern Airlines v. Waterman Steamship Corp.*,[35] in which it denied judicial review of a presidentially reviewable order of the Civil Aeronautics Board on the grounds that such dual review would violate article III.[36]

The principle implied by *Hayburn's Case* and its progeny that the article III guarantee of an independent federal judiciary prevents the legislature and the executive from reviewing a judicial decision complements the rule of *United States v. Klein*[37] that Congress may not enact legislation to eliminate an area of jurisdiction in order to control the results in a particular case. Klein sued in the Court of Claims under an 1863 statute that allowed the recovery of land captured or abandoned during the Civil War if the claimant could prove that he had not aided the rebellion.[38] Relying on an earlier

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[31] *Id.* at 702. Chief Justice Taney's last judicial writing stated:

> Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without remedy . . . unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction: yet it is the whole power that the Court is allowed to exercise under this act of Congress.

*Id.*; *see* Muskrat v. United States, 219 U.S. 346, 354 (1911) (citing Chief Justice Taney's draft opinion as one of "great learning").

[32] 320 U.S. 118 (1943).

[33] *Id.* at 120-22.

[34] *Id.* at 168-69 (Rutledge, J., concurring).

[35] 333 U.S. 103 (1948).

[36] *Id.* at 113-14. In strong language, Justice Jackson observed that "[j]udgments within the powers vested in the courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Id.* at 113.

[37] 80 U.S. (13 Wall.) 128 (1871).

[38] *Id.* at 138-39.

Supreme Court decision that a presidential pardon proved conclusively that he had not assisted the rebellion,[39] Klein won his case in the Court of Claims.[40] While the government's appeal to the Supreme Court was pending, Congress passed a statute providing that a presidential pardon would not support a claim for captured property, that acceptance without disclaimer of a pardon for participation in the rebellion was conclusive evidence that the claimant had aided the enemy, and that when the Court of Claims based its judgment in favor of the claimant on such a pardon the Supreme Court lacked jurisdiction on appeal.[41] The Supreme Court declared this restriction of jurisdiction unconstitutional, holding that Congress had the power under article III to confer or withhold the right of appeal from Court of Claims decisions, but that those parts of article III requiring that the judicial branch be independent of the legislative and executive branches restrict that power.[42] The Court found that the withdrawal of jurisdiction was only a means to deny to presidential pardons the effect that the Court previously had held them to have.[43] Reasoning that such a denial of jurisdiction prescribes for the Court a rule for the decision of its cases, the Court concluded that Congress had exceeded its power to regulate appellate jurisdiction and had passed the limit separating the legislative from the judicial branch.[44] The decision in *Klein* strongly supports the contention that Congress must exercise its power to limit jurisdiction in a manner consistent with the independence of the judiciary. Any jurisdictional limitation must be neutral; Congress may not decide the merits of a case under the guise of limiting jurisdiction.

Ex parte *McCardle*[45] at first view appears to contradict *Klein.* Under authority of the Reconstruction Acts, the military government had imprisoned McCardle, who then brought a habeas corpus action alleging that the Reconstruction legislation was unconstitutional. The lower court upheld the Act, and McCardle appealed under authority of the recently passed Act of February 5, 1867,[46] providing appeal to the Supreme Court from the circuit courts.[47] After the Court had acknowledged jurisdiction but before a decision on the merits, Congress withdrew the statutory right of appeal,[48] seeking to avoid a Supreme Court determination that the Reconstruction legislation was unconstitutional.[49] The Court complied with the withdrawal and dismissed the case for want of jurisdiction.[50]

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[39] *Id.* at 143; *see* United States v. Padelford, 76 U.S. (9 Wall.) 531, 543 (1869).

[40] 80 U.S. (13 Wall.) at 143.

[41] *Id.* at 143-44. The statute also required the Court of Claims to dismiss actions of claimants with presidential pardons who had not previously disclaimed their participation in the rebellion. *Id.* at 143.

[42] *Id.* at 145-47.

[43] *Id.* at 145.

[44] *Id.* at 146-47.

[45] 74 U.S. (7 Wall.) 506 (1869).

[46] Act of February 5, 1867, ch. 26, § 1, 14 Stat. 385.

[47] *See* 74 U.S. (7 Wall.) at 508.

The Supreme Court's compliance with Congressional withdrawal of jurisdiction in *McCardle* should not be read broadly, however, since the Court recognized the limited nature of the statutory withdrawal:

> Counsel seems to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from the jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[51]

To emphasize the narrowness of its holding, the Court in *McCardle* distinguished the case before it from two other cases that it cited with approval, *State v. Fleming*[52] and *DeChastellux v. Fairchild*,[53] in which state courts had struck down the exercise of judicial power by the legislature.[54] Fleming was indicted under an 1838 statute regulating the sale of liquor, but in 1846, while his prosecution was pending, the Tennessee legislature legalized such sales and provided that no one could be punished for violation of the earlier statute.[55] The Tennessee Supreme Court held the 1846 statute violative of the Tennessee constitution because the legislature had no power to interfere with the judicial function.[56] In *Fairchild* the Pennsylvania Supreme Court held invalid an act that granted a new trial to Fairchild, the unsuccessful defendant in a trespass suit. The court reasoned that the statute was an impermissible attempt by the legislature to exercise judicial power.[57] The *McCardle* Court found that in *Fleming* and *Fairchild* the legislature had exercised judicial power by interfering with the courts' continuing jurisdiction, distinguishing the case before it where Congress had exercised its constitutional power to make exceptions to the Court's appellate jurisdiction.[58]

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[48] *See id.*

[49] *See generally* C. FAIRMAN, 6 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, pt. 1, at 433-514 (P. Freund ed. 1971).

[50] 74 U.S. (7 Wall.) at 515.

[51] *Id.* (footnote omitted). The Court clarified the meaning of this statement only months later in Ex parte *Yerger*. 75 U.S. (8 Wall.) 85 (1868). The Court held the same statute as that at issue in *McCardle* did not affect the certiorari jurisdiction of the Court, concluding that the writs of habeas corpus and certiorari could revise the decision of the circuit court and free the prisoner from unlawful restraint. *Id.* at 103.

Under section 14 of the Judiciary Act of 1789, the Supreme Court and other courts could issue writs of habeas corpus and all other writs necessary in the aid of their respective jurisdictions. The writ of habeas corpus could not extend to prisoners unless they were in custody under color of the authority of the United States. *See id.* at 96. *Marbury v. Madison* clarified that the power to issue writs of mandamus under section 13 of the Judiciary Act constitutes an exercise of appellate jurisdiction when exercised by the Supreme Court. *See* 5 U.S. (1 Cranch) 137, 147 (1803). Four years after *Marbury*, the Court similarly construed the provisions of section 14 relating to writs of habeas corpus and mandamus. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 99-101 (1807).

[52] 26 Tenn. 152 (1846).

[53] 15 Pa. 18 (1850).

[54] 74 U.S. (7 Wall.) at 514.

Recent historical scholarship also supports a narrow reading of *McCardle.* The historical evidence surrounding the exceptions clause of article III, granting Congress power to regulate the Supreme Court's appellate jurisdiction, requires that the clause be read in light of the contemporary state practice to confine regulation basically to housekeeping matters and to certain proceedings where neither error nor certiorari traditionally had been available.[59] The framers did not intend that the exceptions clause give Congress the power to control the results of particular cases. Analogously then, Congress may not use the power to restrict lower courts' jurisdiction in order to control the results of particular cases and achieve the result forbidden by a proper interpretation of the exceptions clause.

A congressional statute removing the jurisdiction of federal courts to prescribe school busing as a remedy in desegregation cases violates the rationale of both *Hayburn's Case* and *Klein.* A federal district court that has jurisdiction and has found deprivation of the constitutional right to integrated schools must have the power to order busing if that is the only method of satisfying the equal protection requirement of the fourteenth amendment.[60] The proper means of challenging that ruling is by appeal to a higher article III court. By mandating a rule of decision and providing in effect that a court order is subject to suspension by the legislature,[61] the proposals for prohibiting court-ordered busing would allow formal jurisdiction to continue, but would emasculate the effect of its exercise.[62] Enactment of such antibusing legislation is an improper congressional interference with judicial authority to issue independent judgments.

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[55] 26 Tenn. at 152-53.

[56] *Id.* at 154.

[57] 15 Pa. at 20.

[58] 74 U.S. (7 Wall.) at 514.

[59] *See* J. GOEBEL, 1 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 240 (P. Freund ed. 1971). *See also* Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962).

[60] *See* Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 30 (1971); Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542, 1542-45 (1972).

### LIMITATIONS IMPOSED ON THE INTERSTITIAL RESTRICTION OF ARTICLE III JURISDICTION BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Although article III does give Congress power to affect the jurisdiction of the lower federal courts, other provisions of the Constitution limit the reach of that power.[63] Specifically, Congress may not exercise its article III power over the jurisdiction of the courts in order to deprive a party of a right created by the Constitution.[64] For example, since the equal protection aspect of the due process clause of the fifth amendment guarantees equal access to the courts,[65] Congress could not enact a statute totally denying original or appellate jurisdiction over actions brought by members of a particular racial group. Indeed, a survey of congressional limitations on the jurisdiction of the lower federal courts indicates that the Supreme Court has never upheld a statutory infringement of constitutional rights under the guise of a jurisdictional statute.

The Norris-LaGuardia Act,[66] perhaps the most famous example of congressional removal of jurisdiction, limits a court's power to issue an injunction or restraining order in a labor dispute.[67] This withdrawal of equitable jurisdiction violates neither the article III principles established in *Klein*[68] nor any constitutional rights. Although the restriction limits the relief that labor unions and employers may seek during a labor dispute, Congress may properly limit the courts' equitable jurisdiction if the limitation has some rational basis, since neither a union nor an employer is a suspect class.[69] In upholding the Act's limitation, the Supreme Court implicitly acknowledged this conclusion by recognizing that a business does not have a constitutionally vested right to have a federal court issue an injunction in a case involving a labor dispute.[70] Section 7(e) of the Act, which requires a federal court to determine whether the public officer charged with protecting a complainant's property is unable or unwilling to furnish adequate protection before granting the claim for injunctive relief, provides additional support for the conclusion that the Act does not infringe on constitutional rights.[71] Since an injunction may be necessary to protect an employer's right to due process of law before the taking of property, the section 7(e) determination acts as a sufficient safeguard of due process rights.[72]

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[61] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871); Hayburn's Case, 2 U.S. (2 Dall.) 408, 409-13 n.(a) (1793).

[62] *Cf.* Schneiderman v. United States, 320 U.S. 118, 168-69 (1943) (Rutledge, J., concurring) (statutory provision for invalidating citizenship conferred by judicial decree makes such adjudications merely advisory opinions).

[63] For example, although the Constitution gives Congress the power to punish piracies and felonies committed on the high seas, it limits that power by prohibiting ex post facto laws or bills of attainder. *See* U.S. CONST. art. 1, §§ 8, 9.

[64] Of course, Congress may eliminate statutorily-created rights simply by repealing the statute. *See* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[65] *See* Boddie v. Connecticut, 401 U.S. 371, 380-82 (1971) (due process prohibits states from denying individuals seeking divorce access to the courts solely on the basis of inability to pay); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); *cf.* Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (fifth amendment gives a private right that limits governmental authority under article II to execute the laws).

[66] 29 U.S.C. §§ 101-15 (1970).

[67] *Id.* § 107.

Another congressional limitation on the courts' power is found in the tax Anti-Injunction Act.[73] The courts have upheld the Act's restriction on suits to restrain the assessment or collection of taxes, but only after finding that Congress has provided the injured taxpayer with other adequate remedies.[74] As Justice Brandeis pointed out in *Phillips v. Commissioner*,[75] "where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate."[76] Justice Brandeis' reasoning implies that a jurisdictional limitation in tax cases that deprived a person of property without due process of law would be improper. Consistent with this reading of the statute, federal courts have recognized that there may be an exception to the Act where a plaintiff has no other remedy.[77]

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[68] *See* 80 U.S. (13 Wall.) 128, 146-47 (1872). The Act requires a court to make findings similar to those of an equity court before enjoining a labor dispute. The court must find that substantial and irreparable injury will occur without an injunction, that the balance of hardships favors the complainant, and that the complainant has no adequate remedy at law. Norris-LaGuardia Act §§ 7(b)-(d), 29 U.S.C. §§ 107(b)-(d) (1970).

[69] *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).

[70] *See id.*

[71] *See* Norris-LaGuardia Act § 7(e), 29 U.S.C. § 107(e) (1970).

[72] In fact, the statute serves to implement the first amendment right to peaceful, noncoercive picketing. *Cf.* Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940) (labor dispute is within area of free discussion protected by the Constitution).

[73] INT. REV. CODE OF 1954, § 7421(a).

[74] Bob Jones University v. Simon, 416 U.S. 725, 746 (1974) (where judicial review available, injunction denied university suing to prevent revocation of its tax exempt status); Phillips v. Commissioner, 283 U.S. 589, 597-98 (1931) (summary procedure for collection of unpaid income and property taxes from transfer of property of taxpayer valid since transferee has two alternate methods of judicial review). *See generally* Note, *Nontaxpayer Challenges to Internal Revenue Service Rulemaking: Constitutional and Statutory Barriers to Judicial Review*, 63 GEO. L.J. 1263, 1283-97 (1975).

[75] 283 U.S. 589 (1931).

The portal-to-portal cases[78] are another example of constitutional limitations on congressional power over the jurisdiction of the lower federal courts. In the mid-1940s, the Supreme Court ruled that time spent by workers in previously noncompensable work, such as underground travel in iron ore mines and similar incidental activities, was part of the work week compensable under the Fair Labor Standards Act.[79] This unexpected decision created immense retroactive liability for many businesses and for the Government.[80] In an effort to eliminate this liability, Congress amended the statute to make such work noncompensable[81] and withdrew the jurisdiction of the courts to hear cases that were presently pending or were to be brought under the old statute.[82] The constitutional problems presented by Congress' removal of jurisdiction were carefully considered by the Second Circuit in *Battaglia v. General Motors Corp.*[83] Finding that an amendment of the Fair Labor Standards Act destroyed the plaintiffs' claim to overtime pay under the Act, the court held that because no rights had vested in the plaintiffs, the amendment did not constitute a taking of property and the jurisdictional limitation therefore was valid: Congress' jurisdictional power was not exercised to deprive any person of life, liberty, or property without just compensation.[84] By considering and rejecting this constitutional claim, the court explicitly recognized that congressional power over the jurisdiction of the courts is limited by the due process clause.

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[76] *Id.* at 596-97.

[77] *See* Note, *supra* note 74, at 1286, 1288-89.

[78] *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Jewell Ridge Corp. v. Local No. 6167, 325 U.S. 161 (1945); Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590 (1944). *See generally* Morgan, *The Portal-to-Portal Pay Case*, in THE THIRD BRANCH OF GOVERNMENT: 8 CASES IN CONSTITUTIONAL POLITICS 50-83 (C. Prichett & A. Westin eds. 1963).

[79] *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-93 (1946); Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 598-99 (1944).

[80] *See* D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 145-46 (1975).

[81] Portal-to-Portal Act ch. 52, 61 Stat. 84 (1947), *as amended*, 29 U.S.C. §§ 216, 251-62 (1970).

[82] *Id.* § 2(d), 29 U.S.C. § 252(d).

[83] 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[84] *Id.* at 257. In *Battaglia* the court held that the Portal-to-Portal Act did not encroach on the independent power of the judiciary, attempt to change previous Supreme

The Supreme Court has acknowledged constitutional limitations on congressional power to restrain federal court review of Selective Service cases, a subject over which courts traditionally have exercised deferential review.[85] In *Ostereich v. Selective Service Board*[86] Justice Harlan noted in a concurring opinion that it would raise serious constitutional problems to interpret section 10(b)(3) of the Selective Service Act,[87] which limits the courts' jurisdiction to review Selective Service decisions, as denying a registrant the opportunity to raise a constitutional issue in some competent forum.[88] To prevent the legislature from using the federal courts to accomplish unconstitutional ends, Congress' article III power must be subject to the due process guarantees of the fifth amendment.[89]

These constitutional limitations restrict Congress' power to control federal courts' reliance on busing in desegregation cases. If a federal court finds deprivation of an individual's equal protection rights because of segregative practices and concludes that busing is the only means of correcting the infringement, it must have the authority to order and implement that remedy.

## CONGRESSIONAL POWER TO GUARANTEE EQUAL PROTECTION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Advocates of congressional action to limit court-ordered busing through control of federal court jurisdiction often seek support in section 5 of the fourteenth amendment.[90] That section provides that

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Court decisions, or impose a rule of decision that violated article III or contradicted *Klein*. The Court found that while the Portal-to-Portal Act changed the Fair Labor Standards Act, it left private contractual rights enforceable in the courts except to the extent that they referred to the prior statutory law. *See id.* at 261-62.

[85] *Compare* Falbo v. United States, 320 U.S. 549, 554 (1944) (no judicial review of Selective Service Classification) *with* Estep v. United States, 327 U.S. 114, 119-20, 123-25 (1946) (judicial review of Selective Service Classification after acceptance for induction permissible despite silence of Act). *See generally* Hart & Wechsler, *supra* note 10, at 365-72.

[86] 393 U.S. 233 (1968).

[87] Military Selective Service Act of 1967, § 10(b)(3), 50 U.S.C. App. § 460(b)(3) (1970).

[88] 393 U.S. at 243 n.6 (Harlan, J., concurring).

[89] *See also* 114 Cong. Rec. 10888 (1968). Senator Tydings submitted opinions of legal scholars that a proposed bill eliminating federal review of the admission of confessions into evidence by state courts and federal habeas jurisdiction over state prisoners was arbitrary and would violate the equal protection guarantees included in the right to due process. *Id.* at 10888-97.

[90] *See Hearings on Proposed Amendments*, *supra* note 2, ser. 32, at 1631-32 (statement of Professor Charles Alan Wright); *id.* at 1139 (testimony of acting Attorney General

"[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of [the fourteenth amendment]."[91] Proponents of an expansive reading of section 5 hold that the section grants Congress not only the authority to adjust remedies, but also substantial power to define the meaning of basic constitutional rights.[92] Thus, they conclude, Congress has clear power to limit federal court power to order busing. This argument relies on *Katzenbach v. Morgan*,[93] in which the Supreme Court decided the constitutionality of section 4(e) of the Voting Rights Act of 1965. That section provides that no person who has completed the sixth grade in a Puerto Rican school in which the predominant classroom language was not English may be denied the right to vote in any election because of his or her inability to read or write English.[94] The statute *pro tanto* prohibited enforcement of the laws of New York requiring an ability to read and write English as a condition of voting.[95] The question in *Morgan*, as stated by the Court, was whether the Congress could prohibit enforcement of the state law by legislating under section 5 of the fourteenth amendment, regardless of whether the Court would find that the equal protection clause itself nullified New York's literacy requirement.[96]

The Court utilized a two-part analysis to uphold the federal statute. The Court first construed section 5 as granting Congress "by a specific provision applicable to the fourteenth amendment, the same broad powers expressed in the Necessary and Proper Clause."[97] Under this interpretation, the Court held it within the power of Congress to determine that the Puerto Rican minority needed the vote to gain nondiscriminatory treatment in public services and that this need warranted federal intrusion upon the states.[98] The Court

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Richard Kleindienst). *See generally* R. BORK, *supra* note 1. Professor Burt has argued that section 5, as interpreted by *Morgan*, allows the Supreme Court to "approve congressional action that reshaped Court doctrine . . . ." Burt, *supra* note 1, at 118-21.

[91] U.S. Const. amend. XIV, § 5.

[92] R. BORK, *supra* note 1, at 8.

[93] 384 U.S. 641 (1966).

[94] 42 U.S.C. § 1973 b(e)(2) (1970).

[95] 384 U.S. at 643-44.

[96] *Id.* at 649. In *Lassiter v. Northampton Election Bd.* the Court refused to strike down state literacy requirements for voting as a violation of the equal protection clause in the absence of any showing of discriminatory use of the test. 360 U.S. 45, 53-54 (1959). The *Morgan* court acknowledged *Lassiter* and refused to disturb its earlier ruling. *See* 384 U.S. at 649-50.

[97] 384 U.S. at 650.

[98] *Id.* at 652-53. *See generally* Hewkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971); Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 441 (1971).

reached the same result in the second part of its analysis. Since it perceived a basis, such as hidden prejudice against Spanish-speaking people, upon which Congress might reasonably predicate its judgment that the New York literacy requirement was invidiously discriminatory, the Court was willing to uphold the legislation even if the statute was aimed solely at eliminating such discrimination.[99]

If the court in *Morgan* had limited its rationale to the first conclusion, that Congress may extend the vote to a class of persons injured by discriminatory allocation of government services by a state, *Morgan* would offer no support for legislation aimed at eliminating court-ordered busing. A court still would retain authority to determine whether discrimination exists and whether the legislative remedy is reasonably related to the proper goal. By suggesting that Congress can legislate to address specific violations of the equal protection clause, however, the Court in *Morgan* may have conferred on Congress the power to define the reach of equal protection.[100] Justice Harlan specifically attacked this portion of the majority's opinion as allowing Congress to define constitutional rights "so as in effect to dilute [the] equal protection and due process decisions of this Court."[101]

Justice Harlan's fears may prove accurate: if congressional opponents of school busing conclude that the fourteenth amendment does not require busing, their finding, if supported by a rational basis, may bind the courts. Opponents of busing might argue, alternatively, that by restricting the courts' authority to order school busing, Congress is implementing other constitutional rights such as the first amendment right to freedom of association.[102] That five present Justices of the Supreme Court have explicitly acknowledged and relied on *Morgan* as the reason to respect congressional accommodations of conflicting rights and powers gives additional support to the critics' arguments.[103]

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[99] 384 U.S. at 656.

[100] *See id.* at 653; Burt, *supra* note 1, at 133. According to Burt, "*Morgan* allows a restrained Court, intent perhaps on undoing the work of its active predecessors, [to] permit a graceful and selective retreat limited to those areas where the political branch gives an explicit and contrary judgment." *Id.*

[101] 384 U.S. at 668 (Harlan, J., dissenting).

[102] *Cf.* Green v. County School Bd., 391 U.S. 430, 439-40 (1968) (Court struck down a freedom-of-choice integration plan, but refused to hold all freedom-of-choice plans unconstitutional). It might be argued that the first amendment freedom of association would be furthered by a freedom-of-choice plan. Freedom of association applies to the states through the fourteenth amendment. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

[103] *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, with Blackmun, & Powell, JJ., concurring) (white tenants given standing under section 8(10)(a)

In a recent discussion of congressional power to restrict court-ordered busing under the *Morgan* rationale, Professor Archibald Cox concluded that Congress does have broad power to determine what constitutes a violation of equal protection. Writing in support of legislation to enact a uniform nationwide program of busing, Cox observed that section 5 makes it irrelevant whether the relief for violations of the fourteenth amendment granted under a legislative enactment is greater or lesser than the courts would order.[104] Cox concluded that the *Morgan* rationale requires judicial deference to congressional judgments to limit rights as well as to decisions to extend them.[105]

Reliance on *Morgan* to support the position that Congress has the power to restrict court-ordered busing rests on three questionable predicates: that congressional power to override state law under the fourteenth amendment is as broad as an expansive reading of *Morgan* would suggest; that *Morgan* authorizes Congress to override not only state actions, but also federal court constructions of the fourteenth amendment that are too restrictive; and that section 5 permits Congress to interpret the equal protection clause not only more broadly than the federal courts, but also more narrowly. Congress can rely on a broad reading of *Morgan* to prohibit court-ordered busing under section 5 of the fourteenth amendment only if each of these premises is correct.

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of Civil Rights Act of 1968 despite doubts of case or controversy under article III of Constitution); Welsh v. United States, 398 U.S. 333, 371 (1970) (White, J., with Burger, C.J., & Stewart, J., dissenting) (argument for respecting congressional judgment accommodating right to free exercise of religion with statute for raising armies).

[104] Cox, *supra* note 2, at 259.

[105] *Id.* at 259-60. Professor Cox's proposal and his rationale for its constitutionality were that:

> Congress, if it were willing, might do much better [than the Supreme Court] by enacting a uniform nationwide program, possibly one prescribing affirmative action under three heads: (1) Measures ensuring that the geographical lines for neighborhood schools are drawn and new schools are located so as to maximize integration; (2) additional steps, *including bussing for a maximum distance or maximum time*, wherever necessary to provide within each school district, or combined school district, a stated proportion of racially balanced schools; and (3) machinery by which students in a racially-unbalanced school might elect to transfer to a racially-balanced school or a school unbalanced in the opposite direction.
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> . . . .
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> . . . *There would seem to be as much reason for judicial deference to congressional findings and judgments with respect to the limits of the duties prescribed as there is with respect to their extension.* Only Congress can enact a compromise rule-of-thumb without the need to justify it by the logical application of principle.

*Id.* (emphasis added).

### THE PROPER REACH OF *MORGAN*

The broad language in *Morgan*, cited in support of congressional power to invalidate state laws violating the fourteenth amendment, was unnecessary to the decision of the case. The Court's language appears to be an alternative holding rather than dictum, but subsequent decisions show that the Court has retreated from the more far-reaching implications of *Morgan*.

In *Oregon v. Mitchell*[106] the Court faced challenges to the constitutionality of provisions of the Voting Rights Act Amendments of 1970,[107] which lowered the minimum voting age in state and federal elections from 21 to 18,[108] barred the use of literacy tests under certain circumstances,[109] and forbade state imposition of residency requirements for presidential and vice-presidential elections.[110] If the *Morgan* holding granted Congress carte blanche to enact legislation to remedy what Congress regards as denials of equal protection, the Court would have upheld the federal statute on that basis. Instead, the Court, in five separate opinions, struck down the section of the Act that extended the franchise to 18 year-olds in state and local elections.[111] Only three Justices, Brennan, White, and Marshall, maintained that Congress had the power under section 5 to determine equal protection requirements as applied to the voting rights of 18 to 21 year-olds. They argued that since Congress had sufficient evidence to conclude that exclusion of such citizens from the franchise was unnecessary to promote any legitimate state interest, it could properly extend the franchise, regardless of the Court's view of the matter.[112] None of the other Justices saw Congress' role as that extensive. Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, found that Congress could not usurp the role of the courts by determining the boundaries of the equal protection clause.[113] Rather than reading *Morgan* as granting Congress power to define the reach of the equal protection clause, Justice Stewart reasoned that the Court in *Morgan* only accepted an undoubtedly correct congressional conclusion that a state statute denying a racial group the right to vote amounts to invidious discrimination under the equal protection clause.[114] Justice Harlan agreed that Congress could not define the reach of equal protection; he reasoned that constitutional interpretation by the Congress conflicts with the procedures for amending the constitution, particularly because legislative determinations normally are accorded deferential judicial review.[115] Justices Black and Douglas disagreed on the validity of the Voting Rights Act Amendments of 1970 because of their differing conceptions of the reach of the equal protection clause, but each assumed that the legal question was for the courts, not Congress, to decide.[116]

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[106] 400 U.S. 112 (1970).

[107] Pub. L. No. 91-285, 84 Stat. 314, *amending* 42 U.S.C. § 1973 (1970).

[108] *Id.*, 42 U.S.C. § 1973bb.

[109] *Id.*, 42 U.S.C. § 1973b.

[110] *Id.*, 42 U.S.C. § 1973aa.

[111] 400 U.S. at 118, 124-31.

[112] *Id.* at 240, 280-81 (Brennan, White, & Marshall, J.J., concurring and dissenting).

[113] *Id.* at 296 (Stewart, J., with Burger, C.J., & Blackmun, J., concurring and dissenting).

The opinions of the seven Justices who concurred in *Mitchell* indicate that section 5 does not confer unlimited power on Congress to determine the meaning of equal protection. Although the fragmented Court does not provide a precise guide to the proper limitations, a majority did reject the contention that section 5 authorizes Congress to define the substantive boundaries of the equal protection clause by invalidating state legislation.[117]

## APPLICATION OF SECTION 5 TO FEDERAL COURT DETERMINATIONS

Prior to *Mitchell*, those advocating broad congressional power under section 5 believed that the section gave Congress power, concurrent with the courts, to invalidate state legislation. Even if that reading of *Morgan* was not undercut by *Mitchell*, *Morgan* does not support a statutory prohibition of busing orders designed to remedy equal protection violations. The statute upheld in *Morgan* and the statute partially struck down in *Mitchell* were addressed to certain actions by the states. Antibusing proposals have a wholly different aim, to limit the equitable powers of the federal courts. Whatever the reach of section 5 as a vehicle for augmenting the power of Congress to regulate matters otherwise left to the states, it provides no authority for Congress to interfere with the execution or enforcement of federal court judgments or to overturn federal judicial determinations of the requirements of the fourteenth amendment. The entire fourteenth amendment increased congressional power at the expense of the states, not of the federal courts.

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[114] *Id.* at 295-96.

[115] *Id.* at 205 (Harlan, J., concurring and dissenting).

[116] *Id.* at 117-35 (Black, J., announcing judgments of the Court); *id.* at 135-52 (Douglas, J., separate opinion).

[117] *See* Cox, *The Supreme Court 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106-07 (1966). *See generally* Engdahl, *Constitutionality of the Voting Age Statute*, 39 GEO. WASH. L. REV. 1 (1970). Cox does not appear to have been persuaded that the *Mitchell* case should be read to constrict the broad language of *Morgan*. *See* Cox, *supra* note 2, at 244-61.

Consideration of the history of section 5 shows that it affects only the relationship between Congress and the states, not that between Congress and the federal courts. The framers of section 5 considered it a tool to enable "Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment."[118] Senator Trumbull of Illinois viewed section 5 as the means of "destroy[ing] all these discriminations in civil rights [by the states] against the black man . . . ."[119] Other participants in the debates added that the purpose of the proposed section was to give Congress a means to enforce the fourteenth amendment,[120] to see that it "was carried out in good faith, and for [no] other [purpose] . . . ."[121] Nothing in the legislative history intimates that the section would give Congress the power to overrule the federal courts. In fact, the framers apparently believed that the final wording of section 5 would avoid that possibility. The original draft of section 1 of the fourteenth amendment provided that "Congress shall have power to make all laws . . . to secure . . . to all persons . . . equal protection . . . ,"[122] but the framers of the amendment rejected that formulation because it failed to secure the stated guarantees against a future unsympathetic Congress.[123] The amendment as adopted secures these rights to all persons by placing Congress in the ancillary role of enforcer.

The early cases arising under section 5 focused initially on the new relationship between Congress and the states and later on the role of the courts in determining violations of equal protection. In 1879 the Supreme Court in Ex parte *Virginia*[124] described the new federalism:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action . . . . Such enforcement is no invasion of State sovereignty . . . . [T]he constitutional amendment was ordained for a purpose.[125]

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[118] CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (remarks of Senator Howard, who reported the amendment to the Senate from the Joint Committee on Reconstruction).

[119] *Id.* at 322 (debate on Freedom's Bureau bill).

[120] *See* CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (remarks of Senator Wilson).

[121] *See id.* at 43 (remarks of Senator Trumbull).

[122] CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866).

[123] *See* Burt, *supra* note 1, at 92-93.

[124] 100 U.S. 339 (1879).

[125] *Id.* at 346-47.

Other early decisions suggest that section 5 empowers Congress to enforce the guarantees of the amendment only when Congress and the courts agree that the states have abridged them.[126] Indeed, the Court twice rejected the judgment of Congress expressed in federal legislation that actions of a state government violated the fourteenth amendment.[127]

Although *Morgan* and *Mitchell* may permit Congress to find a state law invalid even if a court would not, neither the legislative history nor the subsequent case law indicates that section 5 authorizes Congress to invalidate federal court action enforcing the fourteenth amendment. *Morgan* allows congressional intrusion into state sovereignty where necessary to secure fourteenth amendment guarantees. *Morgan* does not relax such other limitations on congressional power as that inherent in the fifth amendment.[128] Congressional power to enforce the fourteenth amendment under section 5 does not support antibusing legislation.

## SECTION 5 POWER TO NARROW FEDERAL JUDICIAL INTERPRETATION OF EQUAL PROTECTION

Although the Court in *Morgan* found broad congressional power under section 5 to determine that state practice interferes with fourteenth amendment rights, it did examine the statute for consistency with constitutional requirements.[129] The Court's analysis confirms that federal courts will scrutinize congressional action under section 5 to assure that it meets the equal protection requirements embodied in the fifth amendment.[130] If the legislation includes a suspect classification or affects a fundamental right, then under traditional equal protection analysis only a compelling state interest will support its constitutionality.[131]

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[126] *See* Virginia v. Rives, 100 U.S. 313, 317-19 (1879) (under section 5, mode of enforcement of prohibition against discriminatory state action left to discretion of Congress; one means of enforcement is removal from state to federal court); Strauder v. West Virginia, 100 U.S. 303, 307-09 (1879) (same).

[127] *See* Civil Rights Cases, 109 U.S. 3, 18-19 (1883) (law preventing private citizens from depriving individuals of equal protection); United States v. Harris, 106 U.S. 629, 639 (1882) (same).

[128] *See* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 28 STAN. L. REV. 603, 614 (1975).

[129] *See* Katzenbach v. Morgan, 384 U.S. 641, 656 (1966).

[130] *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (discrimination may be so unjustifiable as to be also a denial of due process; racial segregation in District of Columbia schools such a denial under fifth amendment).

[131] *See, e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1087-132 (1969). The right to an unrestricted exercise of the franchise is fundamental, requiring a compelling state interest to justify any restrictions. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). In *Morgan*, however, Congress did not restrict the franchise, but extended it.

The Voting Rights Act of 1965 at issue in *Morgan*, the 1970 Amendments to that Act reviewed in *Mitchell*, and the Reconstruction laws involved in earlier cases were attempts by Congress to expand the power of the federal government over the states and to extend protection to a group whose rights had been denied in violation of the fourteenth amendment. The statutes in these cases were upheld on the rational relationship test. Antibusing legislation, however, cannot be justified on the same ground. By limiting federal courts' power to extend to racial minorities constitutionally protected rights, such statutes would place special burdens on those minorities seeking to implement their constitutional right to integrated schools and would dilute their equal protection rights. A court must strictly scrutinize such a legislative scheme and uphold it only if supported by a compelling state interest.[132]

The decision in *Morgan*, upholding a congressional mandate of voting eligibility standard arguably more liberal than the judicially defined constitutional requirement, does not support the argument that Congress may restrict a court's power to interpret the requirements of the fourteenth amendment or may limit the available remedies for violations of those rights.[133] A caveat to the Court's opinion in *Morgan* emphasizes the distinction between the power to expand and the power to restrict the reach of equal protection:

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[132] *Cf.* Hunter v. Erickson, 393 U.S. 385 (1969). In *Hunter* the Court held that a provision in a city charter prohibiting the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the city's voters was unconstitutional. The Court found that although the statute did not discriminate on its face, its effect was to place a burden on the minority. *Id.* at 391. The Court asserted that a state may not make it more difficult to enact legislation for one group than for another. *Id.* at 392-93. *See also* Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967); Black, *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 82 (1967). A congressional attempt to make it more difficult for the members of one group to enforce their constitutional rights to integrated public education would be subject to this equal protection attack.

[133] *See* Shapiro v. Thompson, 394 U.S. 618, 641 (1969) (rejecting argument that congressional approval of one-year residence requirement for welfare recipients authorizes states to impose such requirements); *accord*, Graham v. Richardson, 403 U.S. 365, 382 (1971). *But cf.* Welsh v. United States, 398 U.S. 333, 368 (1970) (White, J., with Burger, C.J., & Stewart, J., dissenting) (argument for respecting congressional judgment accommodating right to free exercise of religion with statute for raising army).

Neither may Congress use its power to limit standing so as to affect substantive constitutional rights if it could not do so directly. The courts have often asserted that if a dispute is otherwise justiciable, the question whether a litigant is a proper party to request adjudication of an issue is within the power of Congress to determine. *E.g.*, Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972). Yet, such statements should not control where a restriction on standing may affect a constitutional right. Rather, they should be limited to cases where Congress has created and expanded standing by statute.

> Section 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by section 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.[134]

Although the Court may not have articulated precisely why the power to enforce does not include the power to dilute, it did recognize that a section 5 power to dilute would conflict with a primary purpose of the equal protection clause, to protect citizens' rights under the fourteenth amendment against a hostile Congress.[135] The command of the fifth amendment must control section 5: neither the states nor the federal government, including the Congress, has the power to violate the equal protection clause, as defined by the courts.[136] Reading section 5 as authorizing only extensions of fourteenth amendment guarantees accords with both *Morgan* and the general scheme of the Constitution. Professor Archibald Cox has admitted:

> There is no *a priori* reason for linking power to expand constitutional safeguards with power to dilute them. One can assert without logical fallacy that, since the chief function of the Supreme Court is to protect human rights, it should never defer to any legislative determination which restricts those rights without making its own investigation and characterization of the interest affected, even though it welcomes any legislative determination that extends human

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The Court has indicated that article III also limits the power to restrict or grant standing. *See* Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970). "*Apart from Article III jurisdictional questions*, . . . Congress can, of course, resolve the question [of standing] one way or another, *save as the requirements of Article III dictate otherwise.*" *Id.* (emphasis added). Presumably due process creates another limitation. *See* Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 301 (1943).

[134] 384 U.S. at 651-52 n.10. *See also* Oregon v. Mitchell, 400 U.S. 112, 128-29 (1970) (Black, J., announcing judgments of the Court).

[135] *See* 384 U.S. at 651-52 n.10.

[136] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

rights and is subject to challenge only as an unconstitutional extension of federal power at the expense of the States.[137]

## THE CENTRAL ROLE OF SCHOOL BUSING

Courts may order school desegregation only after finding that the segregated conditions resulted from the failure of local authorities to implement proper educational policy.[138] Once a court has found a constitutional violation, the fourteenth amendment requires the discriminating agency to establish a racially nondiscriminatory school system[139] and to convert to a unitary system that will eliminate racial discrimination.[140] To assure full compliance with the fourteenth amendment, federal courts must have inherent equitable power to issue orders requiring affirmative action.[141]

In many cases several adequate remedies for unconstitutional segregation are available, and the elimination of only one of them would not interfere with any substantive right. In other situations, however, busing may be the only effective remedy for the speedy desegregation plan mandated by the Court in *Green v. County School Board.*[142] As Chief Justice Burger noted in striking down a state law that forbade involuntary busing: "Bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."[143] Even when busing is difficult or burdensome, it may be the only equitable remedy to assure students' rights to immediate desegregation.[144] Prohibiting busing therefore will prevent the court from remedying constitutional violations in certain cases. Moreover, if the circumstances of a given case compel court-ordered busing to vindicate a constitutional right, the remedy itself becomes a right.[145]

Supreme Court decisions dealing with remedies for school desegregation confirm the central position of busing in the scheme of equitable remedies. The anticipated complexity of fashioning appropriate relief led the Supreme Court originally to require only "all deliberate speed" in desegregation.[146] Although the Court required school districts to make a prompt start toward full compliance,[147] the Court permitted additional time to comply if the district proved that such time was in the public interest and in good faith.[148] By 1963, however, the pace of integration forced the Court to note that "the context in which we must interpret and apply this language to plans for desegregation has been significantly altered."[149] A year later the Court warned that the time for mere "deliberate speed" had run out.[150] In 1968, it noted:

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[137] Cox, *supra* note 2, at 523.

[138] Swann v. Charlotte-Mecklenburg Board of Ed., 402 U.S. 1, 16 (1971); *see* Deal v. Cincinnati Board of Ed., 369 F.2d 55, 62 (6th Cir. 1966); Bell v. School City of Gary, 324 F.2d 209, 213 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

[139] Brown v. Board of Ed. (Brown II), 349 U.S. 294, 301 (1955).

[140] Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

[141] Brown v. Board of Ed. (Brown II), 349 U.S. 294, 300 (1955).

[142] 391 U.S. 430, 437-38 (1968).

[143] North Carolina State Board of Ed. v. Swann, 402 U.S. 43, 46 (1971).

[144] *See* Swann v. Charlotte-Mecklenburg Board of Ed., 402 U.S. 1, 28 (1971).

[145] *See* D. CURRIE, *supra* note 80, at 96.

> [A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is intolerable .... The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.[151]

By 1969, the Court was no longer willing to tolerate delay. When the private plaintiffs applied for a stay of the Fifth Circuit's decision in *Alexander v. Board of Education*,[152] granting more time for the desegregation of Holmes County, Mississippi public schools, Justice Black denied the stay, but invited the applicants to present the issue to the full Court at the earliest possible opportunity. Two months later, the full Court followed Justice Black's lead and held:

> [T]he Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual systems at once and to operate now and hereafter only unitary schools.[153]

A short time later the Fifth Circuit acknowledged that holding, but allowed a one-semester delay in the implementation of pupil transfer plans because the order was issued in the middle of the school year.[154] The Supreme Court reversed per curiam.[155] Two Justices thought that the time between a finding of noncompliance and the effect of the remedy, including any judicial review, should not exceed eight weeks.[156] Four other Justices thought that even this delay was too long.[157]

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[146] Brown v. Board of Ed. (Brown II), 349 U.S. 294, 301 (1955).

[147] *Id.* at 300.

[148] *Id.*

[149] Gross v. Board of Ed., 373 U.S. 683, 689 (1963).

[150] Griffin v. County School Bd., 377 U.S. 218, 234 (1964).

[151] Green v. County School Bd., 391 U.S. 430, 438-39 (1968).

[152] 417 F.2d 852 (5th Cir.), *vacated*, 396 U.S. 19 (1969) (per curiam).

[153] Alexander v. Holmes Cty. Board of Ed., 396 U.S. 19, 20 (1969) (per curiam).

School boards may not delay implementation of plans that would immediately eliminate desegregation, and state legislatures and governors may not hamper the implementation of remedies by antibusing statutes[158] or otherwise.[159] The constitutional duty imposed upon Congress in these circumstances should be no less stringent. The Constitution does not permit Congress to create lower federal courts, vest them with jurisdiction to hear cases involving schools, and then effectuate a particularized, interstitial withdrawal of jurisdiction to order busing.[160] A statute that prevents or even delays the federal courts from ordering busing when necessary to guarantee equal protection of the law violates the Supreme Court's repeated interpretations of equal protection and would allow the federal government to accomplish what state legislatures and governors cannot do: deny judicial enforcement of equal protection rights.

## CONCLUSION

Many authorities argue or assume that the power of Congress to limit the jurisdiction of the federal courts is virtually unlimited. Congress' asserted power to abolish any or all of the lower federal courts does not include the authority to engage in narrow, individualized, interstitial removal of jurisdiction. Because both the due process clause of the fifth amendment and various provisions within article III restrict congressional power to limit jurisdiction of the federal courts, the proper test of constitutionality is whether the withdrawal affects substantive constitutional rights. Under this test, Congress cannot use a jurisdictional limitation to restrict a substantive right. Congressional attempts to prohibit busing only in those cases where Congress thinks the lower court has erred would violate article III by imposing a rule of decision on particular cases. Any broader antibusing statute would violate the due process clause of the fifth amendment by forbidding busing even when it is the only adequate means of enforcing the constitutional right to integrated schools.[161]

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[154] Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211, 1216 (5th Cir.) (per curiam), *rev'd sub nom.* Carter v. Western Feliciana Parish School Bd., 396 U.S. 290 (1970) (per curiam); *see* Kelly v. Metropolitan Cty. Board of Ed., 436 F.2d 856, 862 (6th Cir. 1960).

[155] Carter v. Western Feliciana Parish School Bd., 396 U.S. 290 (1970) (per curiam).

[156] *Id.* at 293 (Harlan, J., with White, J., concurring).

[157] *Id.* (Black, Douglas, Brennan, & Marshall, JJ.); *cf.* Dowell v. Board of Ed., 396 U.S. 269, 271 (1969) (desegregation should not be stayed pending appeal).

[158] *See* North Carolina State Board of Ed. v. Swann, 402 U.S. 43, 46 (1971) (unanimous Court invalidated state statute banning involuntary busing).

[159] *See generally* Cooper v. Aaron, 358 U.S. 1 (1958).

[160] Where a lower court errs in its determination that busing is constitutionally required in a particular case, the remedy is appeal to a higher court, not Congress. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974), *rev'g* 484 F.2d 215 (6th Cir. 1973).

Section 5 of the fourteenth amendment does not grant Congress vast powers to define the requirements of the equal protection clause. Rather, it is a remedial section, authorizing congressional action to enforce constitutional guarantees against state infringement. As the Court's analysis in *Morgan* makes clear, Congress may not enact legislation adversely affecting suspect classes or otherwise authorize the dilution of constitutional guarantees; any statutory scheme enacted under section 5 must withstand equal protection analysis. The grant in section 5 allowing Congress to invade states' rights in order to implement protections of the fourteenth amendment in no way gives Congress the authority to restrict federal judicial interpretation of constitutional rights. Specifically, Congress has no constitutional power to restrict court implementation of the mandate of *Brown v. Board of Education*, even if that mandate at times includes the remedy of busing.

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[161] *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Gautreaux v. Romney, 448 F.2d 731, 734-35 (7th Cir. 1971). *See also* Green v. Kennedy, 309 F. Supp. 1127, 1136 (D.D.C.) (three judge court) (per curiam), *appeal dismissed*, 398 U.S. 956 (1970).

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